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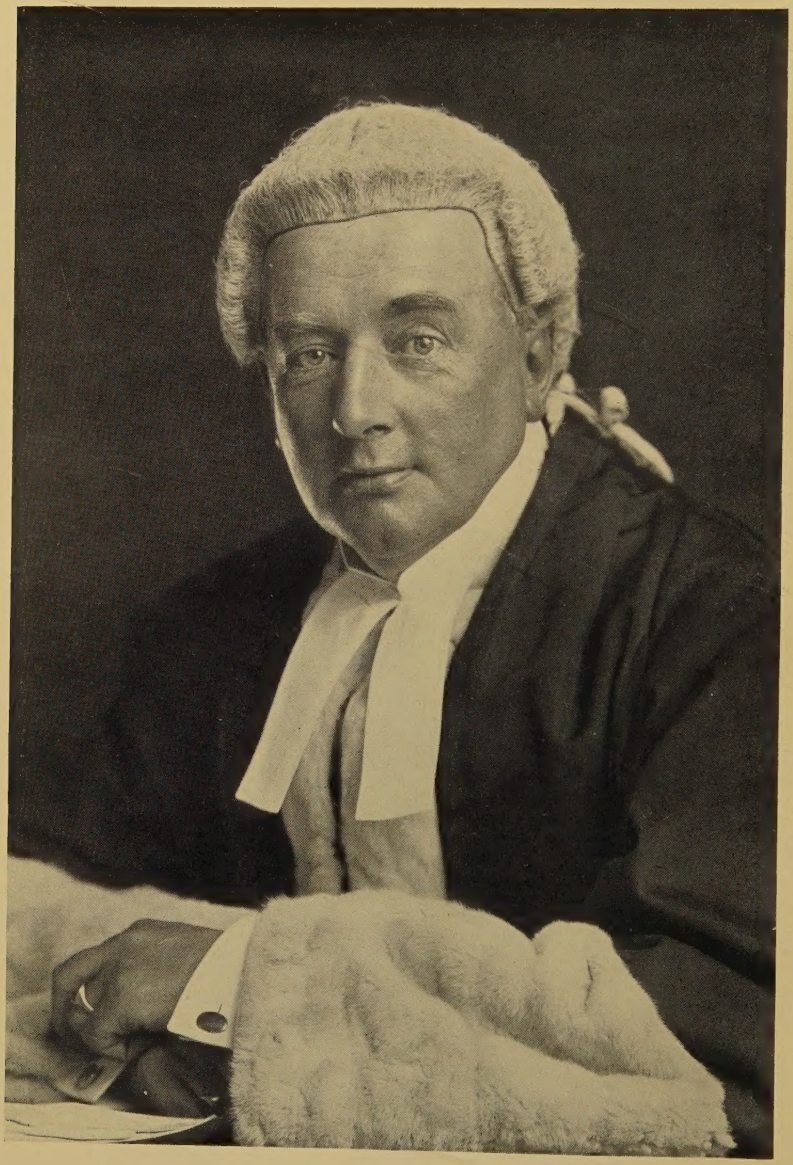

MR. JUSTICE SWIFT

At the time of his appointment to the Bench

THE LIFE OF MR. JUSTICE SWIFT

by

E. S. FAY

With a Foreword by

The Rt. Hon. VISCOUNT SANKEY, G.B.E.

Lord High Chancellor of Great Britain, 1929-35

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TO

KATHLEEN

FOREWORD

BY VISCOUNT SANKEY

'Speak of me as I am; nothing extenuate
Nor set down aught in malice.'

THESE would probably have been the instructions given by Mr. Justice Swift to the man who was going to write an account of his life. Mr. Fay has followed the advice, and produced one of the best and most interesting legal biographies of recent times. It will delight the Judge's old friends, will give to the young barrister who reads it many hints as to what he ought to do or not to do in the conduct of a case, and provide the general public with some very exciting reading.

The book is one of those which, when you take it up, you find it difficult to lay down until you have finished it. Even when the reader has done so, he will turn back to some of the chapters and linger around scenes which have passed away, but which Mr. Fay brings to life again in his luminous pages.

Swift tackled most of his problems at an early age. He was called to the Bar a few days after he was twenty-one, and began to practise at Liverpool. His earnings for the first four years were thirty-eight (from the 1st July), fifty-two, one hundred and twenty four, and two hundred and forty guineas. One wonders what he earned for his last four years as King's Counsel, during which he had an exceptionally large practice. Those who presided over courts in which he appeared will recollect him as a fearless and persuasive advocate, who was particularly successful in jury cases. He made good use of the sunshine of his success. A well-known daily paper described him as having a deliberate Lancashire drawl, although Mr. Fay denies this. However that may be, an Ulster brogue or a Lancashire drawl is often more compelling with a jury than the most correct Oxford accent.

His style of oratory reminded one of the old story about

Brougham and Scarlett (afterwards Lord Abinger), when they were rivals on circuit in the North of England. A juryman said of them that he thought Brougham was far the cleverer man, but he did not think much of Scarlett; he was lucky always to be on the right side. Swift, too, always seemed to be on the right side.

He was for a short time a Member of Parliament, and no one was surprised when, at the age of forty-six, he was made a judge. One of the most anxious tasks of a Lord Chancellor is to advise His Majesty upon the appointment of High Court judges, and Lord Birkenhead had no cause for regretting his recommendation.

Most judges do not attract public attention immediately after their appointment, but Swift almost at once was in the limelight, for he had not been on the Bench more than a few months when he presided over the trial of Mrs. Bamberger at the Central Criminal Court. The limelight may be a gratifying accompaniment to a man's work, but it has its drawbacks, for it shows up defects. His conduct of the trial was a great success. A paper described him as being 'absolutely imperturbable and lacking in the slightest display of emotion from beginning to end; he was emphatically the judge to try such a case'.

So Swift quickly established his reputation, and from that day onwards was frequently in the limelight, presiding over sensational cases. It may be at once said that he came well through all his trials. A mere look at the 'Contents' of the book will show how many they were, and even now they are not forgotten. On page 131 Mr. Fay poses the question, 'Was Swift a great judge?' and quotes certain tests of judicial greatness. It is easier to answer the question 'Was a particular man a great judge?' than the question 'What makes a great judge?' Swift was certainly an outstanding one. He had a strong personality, was an excellent judge of fact, and perhaps for the class of case he tried had the most valuable of all qualities, abundant common sense. There are no doubt great judges who live laborious days and employ their great natural abilities in deciding what a testator did not mean by his Will, or what an Act of Parliament does mean in a hastily drafted section.

Swift would not have felt himself at home in this class of case, any more than such a judge would have been able to try cases like that of Madame Fahmy. One of his most valuable assets was the gift of summing up to a jury, where his simple and lucid language was of the greatest possible assistance in the administration of justice. A typical example is in the trial of Woolmington for murder, where Swift began: 'Members of the Jury: At about quarter-past nine in the morning of the 10th of December of last year, Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. Whilst she was engaged in that occupation, she heard voices from the next-door house. . . .' It may be objected that this was too dramatic, but it at once arrested, and continued to hold, the attention of the jury, and his summing up left them in no doubt about the facts of the case and the law as laid down in contemporary textbooks.

His judgements in civil cases were marked by common sense and conciseness. In later years he became a sick man, and was not always able to control his strong opinions. At times he permitted himself to express his views in a manner which was more consistent with the zeal of an advocate than the dignity of a judge. Notably this happened when trying divorce on circuit. Mr. Fay rightly describes one of these occasions as 'a celebrated outburst'. Well, as long as you have men on the Bench, an occasional outburst may be overlooked. It may even lead to a reform in the law. Perhaps when robots supplant men, outbursts will cease, but justice will not be so well administered. Swift was also a keen law reformer, and he set his face against anything in the nature of red tape and excessive costs. He has left his mark upon legal procedure.

Perhaps a personal note may be allowed. Any one who went on circuit with him as a colleague, or tried an election petition with him as a brother-judge, will remember what a delightful and loyal companion he was, full of good stories, full of wit, and ready with help and consideration on all occasions.

He passed away at the early age, for a judge, of sixty-three; he had then been on the Bench for seventeen years.

Except that the end is always sad, there was nothing here for tears. He had warmed both hands at the fire of life; his work

was done, and for the reasons so admirably referred to in Mr. Fay's concluding chapter, he was ready to depart.

There have been in our time judges with more profound knowledge of case and statute law, with subtler intellect, and a greater gift of laying down lasting principles of jurisprudence, but nowhere has there been found one with a more burning desire to do justice, with more common sense, or with greater human understanding than Rigby Swift, whose passing was regretted by his colleagues, by both branches of the profession, and by those who had seen or heard him administering justice.

SANKEY

April 1939

CONTENTS

PAGE

FOREWORD vii

CHAPTER ONE

THE BOY FROM ST. HELENS 1

A Legal Family—Thomas Swift's Career—A Unique Apprenticeship

CHAPTER TWO

STUFF GOWN IN LIVERPOOL 9

First Briefs—The Wigan Murder—Head of Chambers at twenty-five — Marriage — The Sutton Murder — Liverpool's Leading Junior

CHAPTER THREE

SILK GOWN IN LONDON 22

Chambers in the Temple—M.P. for St. Helens—The Marconi Case—Recorder of Wigan—Methods of Advocacy

CHAPTER FOUR

BIG BRIEFS 34

The Cornwallis-West Affair—The Defence of Col. Rutherford —The W.R.A.F. Inquiry—Big Fees—Beaten at St. Helens by Sexton

CHAPTER FIVE

THE YOUNGEST JUDGE 49

'Happy Day'—Appointed to the Bench—'Kiona'

CHAPTER SIX

THE TRIAL OF MRS. BAMBERGER 58

A Decree Rescinded — Indicted for Perjury — Swift's First Criminal Trial

CHAPTER SEVEN

CRIME AND PUNISHMENT 70

First Circuit—The Problem of Punishment—Hatred of Prison—Letters from Convicts

CHAPTER EIGHT

THE SINN-FEIN CASE 80

Court in a Train — The Sinn Feiners — Treason-Felony — Reputation made as Strong Judge

CHAPTER NINE PAGE

BREACH OF PROMISE OF MARRIAGE 90

A Much-Publicized Pronouncement—Love and Marriage—Lord Revelstoke's Case—A Famous Summing Up

CHAPTER TEN

THE BRIXTON TAXI-CAB MURDER 102

The Shooting of Dickey—A Dramatic Defence—Mason's Sudden Reprieve—Supt. Carlin's Revelations—What is the Truth?

CHAPTER ELEVEN

THE ACQUITTAL OF MADAME FAHMY 118

Eight Murder Cases—Shots in the Savoy Hotel—'Clear the Court!'—The Oxford Election Petition

CHAPTER TWELVE

A MAKER OF LAW 129

Leading Cases—Swift as Interpreter of the Law—Law Tempered with Humanity

CHAPTER THIRTEEN

DIVORCE 141

Swift's Surprising Suggestion—His Antipathy to the Divorce Laws—A Celebrated Outburst

CHAPTER FOURTEEN

ON CIRCUIT 152

The Pomp of Assize—Circuit Recreations—Swift and Children—The Rabbit-catcher's Case

CHAPTER FIFTEEN

THE OLD BAILEY 162

The Charing Cross Trunk Murder—The Zoo Murder Case—The Trial of Lorang

CHAPTER SIXTEEN

THE COMMUNISTS 174

A Sedition Trial—Swift Criticized—The *Daily Worker* Case—Contempt of Court

CHAPTER SEVENTEEN

ANNUS MIRABILIS 182

1929: A crowded Year—The Westwood Crime—The Cotton Wages Arbitration—The Plymouth Election Petition

CHAPTER EIGHTEEN

PAGE

THE OXFORD MURDER CASE 194

A Savage Murder—Conflict of Evidence—Triumph of Circumstantial Evidence

CHAPTER NINETEEN

ENTICEMENT—AND LAW REFORM 210

The Husband-Enticing Suit—Swift as Law Reformer—The New Procedure

CHAPTER TWENTY

THE CIVIL SIDE 220

Laughter in Court—Libel Cases—The Black Magic Case

CHAPTER TWENTY-ONE

THE WOOLMINGTON MISDIRECTION 230

Twice Tried for Murder—The Law in Doubt—Woolmington Freed by the Lords—The Trial of Lord de Clifford

CHAPTER TWENTY-TWO

THE NORTHERN CIRCUIT 242

Swift's Love of Lancashire—Attitude to Northern Circuit Bar—The Outspoken Judge—Lancashire Anecdotes

CHAPTER TWENTY-THREE

THE MONGOOSE CASE 253

Gef the Mongoose—Record Damages for Slander—Conduct of the B.B.C.—A Departmental Inquiry

CHAPTER TWENTY-FOUR

PUCK IN ERMINE 265

Celebrated 'Swift Stories'—The Judge's Kindness—Repartee—Judicial Humour

CHAPTER TWENTY-FIVE

1937 275

The Nodder Case—Failing Health—Death of Swift—The Law's Tribute

APPENDIX: The Circuits and Marshals of Mr. Justice Swift 281

INDEX 283

ILLUSTRATIONS

MR. JUSTICE SWIFT . . . . . *Frontispiece*
(*Photo : Elliott & Fry*)

Facing page

SWIFT'S FATHER 4

SWIFT'S MOTHER 4

THE YOUNG BARRISTER 16

THE YOUNG BARRISTER'S FIANCÉE 16
(*Photo : Medrington, Liverpool*)

THE WHITEHAVEN COLLIERY DISASTER, 1910 . . . 26

ON THE LINKS 54
(*Photo : London News Agency*)

THREE FRIENDS (SWIFT, LORD JUSTICE GREER, AND SIR ERNEST WILD) 170

IN LANCASHIRE, 1928 244
(*Photo : Fred Fyfe, Liverpool*)

IN LANCASHIRE, 1910 244

THE LAST ASSIZE, BIRMINGHAM, 1937 278
(*Photo : 'Birmingham Gazette'*)

AT 'KIONA' 278

Except where otherwise indicated, the quotations at the head of each chapter are the words of Mr. Justice Swift.

AUTHOR'S ACKNOWLEDGMENTS

THE pleasure of writing this biography has been enhanced by the readiness to assist displayed by the late judge's relatives, friends, and acquaintances. On all sides my inquiries have met with the utmost kindness, and assistance has often been volunteered to a degree far greater than I had any right to expect.

My foremost thanks must go to Mr. Archibald Evans, who has put at my disposal both the papers bequeathed him by the judge and his own unmatched memory of the judge's life. He has also by reading the entire MS. saved me from many pitfalls.

My indebtedness must also be acknowledged to the following: Miss Lilian Swift, Lord Fairfield, Lord Justice du Parcq, Mr. Justice Singleton, Mr. Justice Greaves-Lord, Sir Alfred Tobin, Sir Norman Kendal, Sir Edgar Sanders, the Dean of Liverpool, Mr. A. T. Miller, K.C., Mr. Russell Vick, K.C., Mr. F. E. Pritchard, K.C., Mr. J. D. Casswell, K.C., Mr. G. B. Streatfeild, K.C., Mr. Reginald Harrison, the Hon. H. Fletcher Moulton, Mr. O. G. Morris, Mr. Cecil Hayes, Mr. F. D. Yeatman, Mr. Leo Page, Mr. Glynn Blackledge, Mr. Charles Muir, Mr. John Stevenson, Mr. Laurence Vine, Mr. Desmond Leggatt, Mr. Geoffrey Veale, Mr. Lewis Langdon, Mr. Michael Lavington, Mr. W. E. Stone, Mr. B. Dodsworth, Mr. John Kent, the Rev. Kenneth G. Sandberg, Mr. Francis Taylor, Mr. H. W. Stubbs, Mr. T. H. Hughes, and Mr. R. E. I. Newton.

For permission to print letters I am obliged to Viscount Sankey, Lord Hewart of Bury, The Earl of Birkenhead, Lord Mersey, Mr. David Lloyd George, and the Hon. Diana Darling.

Finally I record my indebtedness to the many solicitors and litigants who have assisted me in preparing what I hope are accurate accounts of the trials dealt with; to the Northern Circuit Bar Mess, for permission to print "Horatius"; to the proprietors of *The Times*, for permission to make use of their reports passim; to the staff of the Inner Temple library for their kindness and assistance; and to my wife, on whose shoulders have fallen odd jobs innumerable.

E. S. F.

3 *Paper Buildings,*
Temple, E.C.4.

CHRONOLOGY

1874.	7 June.	Swift born at St. Helens, Lancs.
1892.		Commenced study of law.
1895.	January.	LL.B. London.
	26 June.	Called to the Bar.
1899.	September.	Death of Swift's father; Swift takes over chambers.
1902.	7 June.	Married to Miss Beatrice Walmsley.
	December.	The Sutton murder trial.
1910.	October.	Moves from Liverpool to London.
	6 December.	Elected M.P. for St. Helens.
1912.	5 October.	Appointed King's Counsel.
1915.	12 November.	Appointed Recorder of Wigan.
1916.	September.	Defence of General Cowans.
1917.		Purchase of ' Kiona ', Crowborough, Sussex.
1919.	April.	Defence of Colonel Rutherford.
	December.	Loses seat in General Election.
1920.	21 June.	Appointed one of H.M. Justices of King's Bench Division.
	12 August.	Knighted.
	September.	Trial of Mrs. Bamberger.
1921.	July.	Sinn Fein treason-felony trial.
1923.	July.	Trial of Mason.
	September.	Trial of Mme. Fahmy.
1924.	May.	Oxford Election Petition.
1925.	November.	Communist sedition trial.
1927.	June.	Charing Cross trunk murder trial.
1929.	March.	' Westwood crime ' trial at York.
	16 August.	Chairman of Cotton Wages Inquiry.
	October.	Plymouth Election Petition.
1930.	November.	Trial of Lorang.
1931.	October.	Trial of Seymour for murder, Oxford.
1932.	24 March.	Commencement of New Procedure.
1933.	June.	Newton *v.* Hardy (action for enticement).
1934.	April.	Crowley *v.* Constable (' the Black Magic case ').
1935.	February.	Trial of Woolmington.
	May.	Dawkins *v.* Lord Revelstoke (breach of promise).
	24 May.	Hon. LL.D. Liverpool.
	12 December.	Trial of Lord de Clifford at Bar of House of Lords.
1936.	November.	Lambert *v.* Levita (' the mongoose case ').
1937.	20 April.	Death of Lady Swift.
	17 August.	Last sitting in court.
	19 October.	Death of Swift at ' Kiona '.

CHAPTER ONE

THE BOY FROM ST. HELENS

'The County Courts and police courts of Liverpool, Bootle, Birkenhead, and St. Helens were the class-rooms in which I learnt my business.'

'I TAKE a special interest in this hospital, as I was born there,' said Mr. Justice Rigby Swift from the Bench at St. George's Hall, Liverpool, one morning in 1930. He was trying an accident case in which the victim had been treated at the Providence Hospital, St. Helens, and its name had carried his mind back half a century to the time when it was not a hospital but a private residence, Hardshaw Hall, the home of Thomas Swift and the scene of the judge's first childhood memories.

Rigby Philip Watson Swift was born on Sunday, 7 June 1874. He was the eighth child of his father and the first child of his father's second wife. His four names were derived from his four grandparents, from George Swift and Alice Swift, *née* Rigby, his father's parents, and from Philip Daft and Mary Ann Daft, *née* Watson, his mother's parents. The Dafts hailed from Nottingham, but the paternal pedigree was pure Lancashire: George Swift was a Prescot man, and the Rigbys were a Runcorn family. The law, too, was in the paternal blood, Thomas Swift being at this time a successful solicitor in St. Helens, and his brother William being Clerk to the Liverpool County justices, while their first cousin, John Rigby, was making his name at the Chancery Bar. By his first wife Thomas Swift had four sons, three of whom—John, Walter, and Ernest—became solicitors and joined the family firm. Ernest Swift later made a considerable local reputation as an advocate, and in 1912 was appointed Registrar of the St. Helens and Widnes County Courts. He died in 1927. (The family firm at St. Helens still continues under the style of Swift, Garner and Son, but at the present day no Swift is a member of the firm.)

Law and Lancashire: those two influences, destined to play a predominant part in moulding the character of Rigby Swift, thus encompassed him from his earliest days. How strongly they shaped his destiny these pages will show. A third pro-

found influence upon young Swift was the character of his father.

Thomas Swift belonged to a race of men that has utterly vanished from the face of England. He was that Galsworthian figure, the Victorian father. Strong of feature, strong of voice, strong of arm, he dominated his surroundings and his family, a true product of the hard-living, hard-drinking, hard-dying nineteenth-century north country, where industry was still expanding with the Empire and men's views were still expanding with their fortunes, and to be the head of a family still gave a sense of security and power.

In 1882 Thomas Swift took a step of immeasurable importance to his eight-year-old son. He changed his profession. He gave up his practice as a solicitor and was called to the Bar at Lincoln's Inn. Doubtless the example of his cousin, who had become a K.C. in the previous year, encouraged him; but the fundamental reason must have been his assumption—an assumption which proved correct—that his talents would find better employment in advocacy at the Bar than in the routine of a solicitor's office. That at the age of fifty he could both appreciate this fact and summon the courage necessary to translate it into practice is the highest testimonial that could be furnished to his strength of mind.

In the previous year the family had moved to Mill Brook House, Eccleston, and the new departure foreshadowed a further move. Thomas Swift meant to practise at Liverpool: he took chambers in Harrington Street, and in 1884 settled his wife and children at a comfortable house at 36 Linnet Lane, Sefton Park. (St. Helens, however, never forgot him, and there are still old people who remember 'Owd Torney Swift', as the townsfolk affectionately knew him.)

He was immediately successful in his new vocation, and quickly acquired a large local practice. He was much in demand in criminal cases, once finding himself in a *cause célèbre*, being junior prosecution counsel in the trial of Mrs. Maybrick, and he also specialised in that complicated branch of the law dealing with public-house licensing. Those were the days of high feeling upon the liquor question; there was far more licensing litigation than to-day, and Tom Swift would be in all the cases on one side or the other. He belonged to a school of advocacy that, like his kind, has passed away, the school clinging to knowledge of human nature rather than knowledge of law and putting force of personality before force of argument. In his stronghold, the county sessions, few dared gainsay him when his fine, old-fashioned Lancashire voice was

rolling round the court. He would sit in the sessions with a breastwork of law reports round him; when one of his early clerks inquired which reports to bring, tradition relates that he replied, 'The biggest, you fool!' He never had occasion to cite any of these reports. If some objection was taken, he would rise majestically, tap a volume with a knowing finger, and say with awful emphasis 'Ah, but——'. The Bench, quite satisfied that he had an unanswerable authority, never called his bluff. Once a courageous opponent submitted that some evidence he had tendered was irrelevant. The Bench and their clerk retired to consider the point. They came back looking like a jury about to find a verdict of 'guilty' in a murder trial. They found against Swift, and awaited the storm.

It came. 'Tommy' Swift threw up his hands and cried, 'It's a great thing to grow old, and be taught by children!'

His late arrival among them made no difference to the warmth of welcome from the Liverpool Bar. He was one of them from the first night he dined with the Northern Circuit Bar mess. He speedily found his niche in that close corporation of good-fellowship and achieved recognition as one of the outstanding personalities among them—a recognition hastened by his ingrained sense of humour. It was a robust, nineteenth-century sense of humour: 'My family is half Daft', he loved to tell his startled friends. Nor did his influence cease with his death; his presence is vividly remembered by the older Liverpool lawyers to-day, they being apt to grow somewhat scornful when they hear younger men eulogizing Rigby Swift. 'Ah, but you should have seen his father,' they say, 'there *was* a man!'

Rigby both by inheritance and by close association acquired many of his father's attributes. Two things seem to have been quite certain from his earliest moments: one that the law was to be his profession (his grandmother always called him 'Lord Chancellor' as she dandled him on her knee), the other that he had a mind of his own. His first 'public' appearance took place when he was a few months old; at a dinner-party at his father's house his mother discovered that they were thirteen at table and refused to sit down: 'Bring down the baby', roared the father, and the infant, propped up on a chair, proceeded to express his ego by howling throughout the entire meal. ('My experience of dinners is that the baby has yelled ever since,' said the judge, telling that story in an after-dinner speech in 1929.) The individuality thus emphasized to the thirteen diners became impressed upon an ever-widening circle of persons as the young man grew up.

It was noted at school. He first went to school in 1884, at the age of ten, his early instruction having been given him at home by a governess. The first choice of school was not a happy one; it was a small and in fact decaying preparatory establishment close to his home, at which his life was described by him a few years later in the following terms: 'I remained there for about two years, during the early part of which I was immoderately bullied, and during the latter part of which I immoderately bullied and assisted in bullying others. During the whole time I was there I think I learnt nothing, and as the number of boys gradually got less, the school broke up, and I went in May 1886 to Parkfield School.'

Parkfield was then under the charge of Mr. Robert Ray, affectionately called 'Daddy Ray' by the boys. There Swift spent five happy years, becoming in due course head boy. A fellow-pupil of his, Mr. A. T. Miller, K.C., remembers the Swift of that period as a lad with the same individual traits that he exhibited upon the Bench: 'As a senior boy he had the same manner of dealing with the younger boys that as a judge he had in dealing with young barristers, the same air of kindly, easy authority'.

Swift played cricket and Rugby at school, although he never was an outstanding athlete. He could at this time be seen on occasions making an unsteady progress upon a penny-farthing bicycle.

In the year 1892, at the age of seventeen, Swift commenced his study of the law with a view to being called to the Bar. He commenced this course of study in a manner unique in the strict sense of being absolutely without precedent. The customary method of preparation for call to the Bar, then as now, was for a young man to study, whether at a university or privately, the theory of the law, following this up either immediately before or immediately after call by becoming a pupil to a practising barrister, in order to supplement his theoretical knowledge with acquaintance with the profession's practical aspect. Theory first, practice afterwards; that has long been the inveterate rule. Swift broke this rule by studying theory and practice simultaneously, broke it moreover by the unprecedented course of going into his father's chambers at the age of seventeen.

There for more than three years father and son helped one another with their appointed tasks. The father devoted his spare time to coaching the son, while the son in return copied his father's opinions and pleadings and generally busied himself about the routine of chambers. This status will be

SWIFT'S FATHER

—AND MOTHER

recognized as something closely akin to that of a solicitor's articled clerk, and it may be that Thomas Swift's experience of the other branch of the profession led him to adopt it. But however familiar such a training may be to solicitors it is unknown to the Bar, and there were even some strait-laced counsel in Liverpool who uttered vague murmurs about the etiquette of the Bar being infringed. That, however, did not worry Thomas Swift, who had satisfied himself that there was nothing unprofessional in this conduct—and posterity may applaud his enterprise, for without any doubt Rigby Swift's unusual outlook and deep grasp of procedure were due to his soaking himself in the practice of the Law at his most impressionable age and being daily occupied in chambers at a time when his conventional competitors were at lectures. The future judge owed —as he gladly acknowledged—an immense debt to his father, not only in this respect, but also for the thorough grounding he received in the law ; his father coached him with a patience and a painstaking kindness that no other tutor could have shown, reaping his reward both in paternal pride and in cementing by the bond of their common profession the close comradeship already existing between them.

In those chambers at 8 Harrington Street, Rigby met a young man of much his own age, and so commenced an association destined to last throughout their joint lives. This was Archibald Evans, who three years earlier had become his father's clerk. Evans's apprenticeship was in its way as remarkable as Swift's : a barrister's clerk has one of the most delicate and difficult tasks in the legal world, and even the bare mechanics of the position take some time to be learnt. For this reason clerks ordinarily start as junior clerks, under the supervision of a mature exponent of their art. Evans did not do this : he commenced, as he continued, to be Thomas Swift's only clerk. He was a ' senior ' from the start, and had to use his native wit to pick up of his own accord what others learn by example. One of his earliest encounters with Rigby Swift took place on the Rugby field when Rigby was playing for Parkfield Old Boys and he was playing for South Liverpool ; four decades later the judge recalled that match to him and complained that he had been too well ' looked after '. The two young men, both ambitious, sharing common enthusiasms and thrown together in their daily work, quickly learnt to understand one another, and there soon grew up between them the mutual respect and friendship that survived—indeed was enhanced by—the passage of forty-eight years.

Rigby before long became well known to legal Liverpool.

Each morning two silk-hatted figures would be seen making the journey from Sefton Park to Harrington Street, and each evening the son would be seen dutifully escorting his father back again. Presently the word began to go round that Tom Swift's lad was showing unusual promise, and the city's solicitors began wondering what lay the other side of call day. His Honour Judge Sir Alfred Tobin, K.C., then one of the local Bar's busy juniors, used to take his pupils round to be introduced to the various celebrities. On taking a pupil one day to Thomas Swift's chambers, they found the door opened to them by a lanky young man with a shock of hair and an enormous briar pipe. 'My dear boy!' said Mr. Tobin, and turning to the pupil, added, 'This is Tommy Swift's son, Rigby, who is going to be called to the Bar—and when he is, you and I will have to look out for ourselves!'

If the lawyers were taking note of Rigby Swift, the young man repaid the compliment with interest. It was a day of remarkable men at the Liverpool Bar. Giants of the older generation, such as George Segar, Judge Shand and W. J. Stewart (afterwards stipendiary), were still in their prime, while rising into lucrative practices were a galaxy of young men—Tobin, Kyffin Taylor (now Sir William F. Kyffin Taylor, K.C., Judge of the Court of Passage), Lawrence (afterwards Lord Justice Lawrence), Pickford (afterwards Lord Sterndale, Master of the Rolls), Horridge (afterwards Mr. Justice Horridge), and many another. Swift knew them all, knew them intimately, and knew them long before he was 'called' to join them. One evening his father sent him to deliver a brief at the house of a newly-called barrister named Greer, who had promised to devil it. From that errand dated Rigby Swift's acquaintanceship with one destined to be his keen competitor and close friend for the rest of his life—Lord Fairfield, who retired from the Court of Appeal last year.

At the same time the young man was cultivating habits which were to remain with him throughout his life. In 1891 he attended the funeral of a sister-in-law, wearing for the occasion a black tie. This event led to his discovery that he liked black ties, and after that day he wore no other shade. Later on he had his black ties specially made. While still in his 'teens he acquired the first of the succession of large briar pipes that were to be his inseparable companions throughout life. He was also at this time cultivating that remarkable manner of speech which was so individually his. Southerners used to imagine, pardonably perhaps, that what he spoke was the Lancashire tongue, but this was not so, and no Lancastrian would

acknowledge a local accent in it. Its basis, it is true, was northern, this being especially apparent in the short *a* he invariably employed, but he took especial pains to eliminate the broader features of the Lancashire speech and put in their stead a rounded, perfectly modulated tone all his own, supplementing and giving character to the result with one or two verbal mannerisms such as his habit of pronouncing the final syllable of words like 'November' with a species of explosive drawl—"Novem-*bah*!" This particular mannerism came to attach itself to his first name by which he was always known in the profession, and many lawyers used to refer to him and think of him as 'Rigbah'. (He was 'Philip' to his home circle, but among lawyers he was always Rigby (or Rigbah), and even after he became a judge the usage persisted: 'I'm briefed before Rigby tomorrow', you would hear counsel say. This was one facet of the lasting comradeship built up between Swift and that amorphous but very human institution, the Bar. One never heard counsel saying they were 'before Horace' when on their way to Mr. Justice Avory's court.) He paid equal attention to his enunciation, and taught himself that most difficult of lessons for impetuous youth to learn, the desirability of speaking slowly. A close friend of his describes his manner of speech as follows: 'It is in the highest degree difficult to convey on paper the undoubted accent he preferred. I have always thought of it as a flattening of the vowels. It is also very important to indicate what beautiful enunciation he had, whereby the effect of no syllable or inflexion was lost; an enunciation "cultured" in the true sense and not merely affected or copied from others. I have never heard anybody speak in the same way as Swift, and I do not suppose that the circumstances which gave birth to his manner of speech are likely to occur again.'

Practice in speaking Swift obtained through the debates held by the Liverpool Law Students Society. On one occasion he 'led' for this society in a debate with the Birmingham Law Students Society, his opponent being a brilliant young man then shortly to be called to the Birmingham Bar. His name was Henry McCardie.

Meanwhile under his father's watchful eye his studies were approaching completion. He had matriculated at London University soon after leaving school, and had in the same year been admitted as a student to Lincoln's Inn. He set himself to work for the London LL.B. examination. After three years of his unusual apprenticeship his dreams came to fruition in the year 1895. In January of that year he gained his LL.B. On 7 June he came of age. And on 26 June, nineteen days after

he thus became eligible, he was called to the Bar at Lincoln's Inn. His successful kinsman, Sir John Rigby, who had a few months earlier exchanged the Attorney-Generalship for a seat on the Court of Appeal Bench, proposed him, and he was called by the Treasurer of the Inn for that year, the celebrated lawyer Sir Joseph Chitty.

* * * * *

On 1 July 1895 two silk-hatted figures made the morning journey to Harrington Street. They were no longer master and pupil; they were two brother-members of the Liverpool Bar, for on that day Rigby Swift, Esq., of Lincoln's Inn and the Northern Circuit, barrister-at-law, sat down at a desk of his own in the familiar chambers and commenced to hold himself out for practice at the Bar.

CHAPTER TWO

STUFF GOWN IN LIVERPOOL

' Whatever I am can be summed up in one word— Liverpool.'

SWIFT'S first brief was given to him by his uncle, the clerk to the county justices. It instructed him to prosecute a woman charged with larceny of a sheet, a chemise, and a kettle, and it was marked with the minimum fee which counsel may accept, one guinea. The lady duly appeared in the dock at the county quarter sessions and, much to the relief of the prosecuting advocate, pleaded guilty. Swift's first appearance in wig and gown, therefore, was confined to informing the justices of the nature of the offence and listening to the sentence.

His first ' fight ', involving examining witnesses and addressing a jury, came four months later. It was before Mr. Justice Cave, and when that judge died two years afterwards, Swift wrote down his recollection of the cause in the following terms :

' Cave J. was the first High Court judge I ever appeared before, and I was before him in the first contested case I ever had. I prosecuted a man for raping a married woman in November '95. In my inexperience I " led " horribly, and frequently called down upon myself the observation " that won't do, you know ". Cuthbert Smith defended, the man was convicted and sentenced to eight years' penal servitude, but was almost immediately released (I think improperly) by the Home Secretary. Cave, though grumpy and not overpolite, was not unkind, and I rather liked him than otherwise.'

Those remarks were written in an annotated scrap-book which Swift started keeping two years later. He devoted the first four pages of this volume to an account of ' Myself up to 1st Oct. 1897 ', the last words of this epitome being, ' Now, in October 1897, I am still a very struggling junior in Liverpool, still in chambers with my father, and excessively impecunious '. The scrap-book unfortunately did not last long; the hand-written entries stop before the end of the year, and the sparse newspaper cuttings cease soon afterwards. Swift was never one to enjoy writing for its own sake (later on he could be

persuaded to write letters only with difficulty), and introspection being a thing entirely foreign to his outward-looking nature, he derived no comfort from setting down his achievements or aspirations on paper. The tongue and not the pen was his chosen medium, and the diary scrap-book was doomed from its inception to an early death.

One illuminating gleam comes from the pages of this book before it peters out: describing his first brief, Swift writes, 'I felt rather nervous on making this, my first appearance in court, and have occasionally had the same feeling since, but my dearest friend would not say modesty was one of my failings, and I soon got over it'. At the end of this passage an asterisk has been added, and on the opposite sheet there appears this note, bearing the date 23 June 1913: 'In after-years I find this was written in haste. I have never got over a feeling of nervousness in going into court, and feel it particularly in going into a strange court or on to a platform before strange people.'

It was a serious and matter-of-fact young man who wrote in 'Myself up to 1897' a bald catalogue of dates and events, with never a hint of hopes, ambitions, disappointments, or fears. It was a self-confident young man who could banish an innate nervousness with a phrase, and who could at the age of twenty-three express his disapproval of the Home Secretary's clemency. It was a studious young man who had passed his examinations with credit and whose legal learning was the joy of his father's heart. There were other qualities, too, wrapped in the short, thick-set frame and hardly concealed behind the massive forehead, the firm mouth, and the keen grey eyes. There was a solidness and maturity about him. One aspect of this was his quiet and unostentatious devotion to the Established Church—he was a churchwarden at St. Luke's, Bold Street, for many years—and another was his possession of a foresight and judgement beyond his years. Thus—to take a trivial example—he always went from chambers to the courts a longer way round through the main streets, instead of taking the short cut through the lower end of Harrington Street, as many counsel did. The short cut saved three minutes if you were lucky, but being a narrow lane of warehouses, waiting drays and swinging bales, it sometimes had the opposite effect. Swift tried it once, and once only. He dubbed it 'Contributory Negligence Lane', and went the other way.

He was a young man with ambition, but he was not a young man in a hurry.

The most brilliant of men cannot hope to spring forthwith

into lucrative practice at the Bar, and it is not surprising that after two years Swift was still ' excessively impecunious '. His first years were largely occupied in taking notes in court for his senior brethren, and in ' devilling ' cases which they were unable to attend to, varied with ' dockers ' and ' soups ' (dock defences and rota prosecutions at sessions) and an occasional guinea brief in a humble police court. He made the beginner's mistakes; he missed points, he ' led ' witnesses, he asked the wrong questions, he over-emphasized favourable points—but he seldom made the same mistake twice, and because, thanks to his unusual training, he had not to divert most of his energies, as his contemporaries had, to mastering the puzzling mechanics of procedure, he was able to devote his whole time to polishing his advocacy. How quickly he succeeded is shown by a letter from J. W. Knowles, a Widnes solicitor who had briefed him for a prisoner twelve months after his call. Knowles was himself an advocate of experience and ability, and had moreover an unflattering opinion of the Bar in general. Praise from him, therefore, was praise indeed. In his letter he noted three points in the conduct of the defence: ' (1) Cross-examination of police very fair, (2) cross-examination of prosecutrix excellent, and (3) oratorical display far in excess of my best hopes, and certainly what I never anticipated from a junior member of the Bar '.

Such a tribute presaged well for the future of the twenty-two-year-old barrister, and as the months passed by his work continued to increase. In 1897 he earned his first big fee (17 guineas for brief and 1 guinea for conference, ' 17 and 1 ' in legal jargon) as junior to the great Bigham, Q.C. (afterwards Lord Mersey), in a licensing appeal. He used in after-life to recall how his duties on that occasion consisted largely in rescuing documents scattered by his learned leader in the excitement of his eloquence: ' Pick up those papers, Swift ', was the burden of his instructions. In the same year his slender income more than doubled itself. With increasing work he would find himself now and then briefed in opposition to Thomas Swift, and then the court would fill with legal onlookers delighted to hear father and son referring patronizingly to one another as ' m'learned friend ', and to see Rigby baiting his father with points and objections, both good and bad, while Swift senior, outwardly raging but inwardly delighted, would from behind his hand threaten Swift junior with condign punishment ' when he got him home '. Rigby was briefed with his father, as well as against him, on numerous occasions during the all-too-short time when their careers at the Bar overlapped.

The young man's bluff humour, later to be one of his most formidable weapons, was thus developing, and so was his sensitivity to the atmosphere of a tribunal, and his adaptability to whatever its peculiar requirements might be. A crude instance of this last trait is seen in his tactics before the Liverpool Court of Passage. That venerable local court was then presided over by the octogenarian Judge Baylis, white-bearded and not a little deaf. The judge had long before written a book upon the law of servants, and if Swift found himself unable to rouse him by other methods, he would cite as loudly as he could 'your Lordship's well-known codification of the law relating to domestic servants'. This would invariably enlist the judge's attention, and may have had some bearing upon Swift's signal success in that court. The skill with which he contrived to pray in aid a passage about maidservants in a case relating to a bill of exchange or a tramcar-collision was remarkable.

He could use firmness, too, when the occasion demanded it. It was the same judge who, being told that a case of Swift's was likely to be a long one, directed that it be placed at the bottom of the list. 'Am I to understand that this court does not want important cases?' demanded Swift. He kept his original place.

And so work continued to increase, his progress being reflected in his gross earnings during his first five years:

Age.	*Year.*	*Guineas.*
21	1895 (from 1st July)	38
22	1896	52
23	1897	124
24	1898	240
25	1899	462

Among his briefs at the close of the century were a number arising out of the religious disturbances then endemic in Liverpool. The city's large Irish population was split into Catholics and Orangemen, and the heat engendered by their perennial conflicts proved a forcing-ground for all manner of sectarian growths. Swift touched the fringe of this ferment when in 1898 and 1899 he defended a number of enthusiastic Protestants charged with disturbing divine worship in churches they deemed to be 'ritualistic'. His good humour proved a signal asset in cases of this nature, and effectually prevented any of the prevailing rancour infecting the court proceedings. One defendant demurred at being bound over, and the magistrate advised him to consult his counsel. 'I have advised him to

keep out of church altogether, your worship,' observed Swift drily, and the case ended with laughter in court.

These were humble forerunners of one of Swift's biggest Liverpool briefs, that instructing him to represent the police at the twenty-four day inquiry held in 1909 into the conduct of the police force when dealing with the serious religious riots of that year. Many people had been injured, and the Protestants complained of police discrimination against them. Swift's cause was completely successful, and the arbitrator, Mr. A. J. Ashton, K.C., cleared the constabulary of all the charges made against them.

* * * * *

Swift's first murder case came in 1899, when at the request of the presiding judge, Mr. Justice Wills, he defended a man named Tighe charged with the savage killing of his wife. (Mr. Tobin and Mr. A. G. Steel prosecuted.) It was a pathetic case. The prisoner was a former pit-sinker who had been incapacitated for work by an accident. He lived with his wife and four youngest children in a gloomy two-roomed house in a dismal street in Wigan. The husband was a sober-living man, but the wife was often drunk; very little furniture was left in the house, as most of it had gone to the pawnbroker's to pay for liquor. The eldest girl told the court how on the day of the tragedy she had had to pawn her brother's clothes to buy some bread and butter. The husband came in later and asked for oatmeal; there was none in the house, and the wife offered him porter instead. There was a quarrel, and presently the prisoner forcibly took twopence from the wife and sent his daughter to buy oatmeal. . . . When the girl returned the mother was dead, stabbed twenty-six times with a kitchen knife. 'She was nagging at me, and cursing me, and wishing the Devil had me out of the house,' Tighe said. 'The deepest pit in England is not deep enough for the likes of her. I am better dead than alive.'

The defence was hopeless, but Swift in an oration charged with emotion asked the jury to find that the prosecution had not made out its case, that the accused must have given way to an irresistible impulse, and that the highest verdict could only be manslaughter. 'You are trying a question of life and death,' he urged. 'We are told sometimes that a jury has nothing to do with the consequences of its verdict. I agree that that is the law, but so long as you are men of flesh and blood you cannot put aside the consequences of your act, and so long as you possess intelligence, on arriving at a decision you will consider what is likely to happen when that decision is given!'

It was making bricks without straw, and Tighe was found guilty with a strong recommendation to mercy. The judge complimented the passionate young advocate on the 'great taste and propriety' of his address, though he mildly added that it was his duty to correct what appeared to him to be some erroneous notions of law pervading the speech. It is noteworthy that when, twenty-four years later, Swift sat upon the Bench conducting his first great murder trial, the Mason case, he was moved to make the same correction of this same fallacy that a jury should think beyond their verdict to the gallows' noose: did his mind then go back across the years to the stifling August afternoon in the Crown Court at Liverpool when the Wigan tragedy was moving to its predestined end?

Tragedy was stalking Rigby Swift that summer. A little over a month after his wretched client had been sentenced to death it dealt its heaviest blow to his private life. On 26 September, shortly after noon, he escorted his father, as was his custom, from the chambers and saw him on to a bus. 'Good-bye, Philip,' said Thomas Swift, and he went off home for his lunch, seemingly in the best of health. But he never reached his house. After leaving the bus he was taken ill in the street. Passers-by carried him into a shop, where he died of syncope. He was sixty-seven years of age.

It is unnecessary to dwell upon the lasting grief caused to the son by the sudden death of the father who was so much more than a parent to him. It is, however, necessary to set down the effect of the bereavement upon Swift's legal career.

For his father's death caused a crisis of the first magnitude in his life in the law. Hitherto the Swifts had carried on their practices comfortably in the father's modest rooms in Bristowe Chambers. What was now to become of the chambers? Who was to pay the rent? What was to happen to Evans, who had played no inconsiderable part in building up the two practices? The safe course, no doubt, would have been for Rigby to seek a room in the chambers of some well-established counsel, and there were many who would have welcomed him. The prudence of such a course may be seen by referring to the table of earnings given a few pages back. There was an alternative, however, and after a long talk with Evans, Swift decided upon that alternative. He took over the old chambers himself. They would have to tighten their belts for a time, and they would look out for one or two young men to come in as tenants and lighten the burden, but they would go on.

Swift thus became head of a set of chambers at the age of twenty-five—a fact, like his apprenticeship, almost without

precedent. The courage required to take such a step needs no underlining. That it was no foolhardy courage the outcome showed; indeed, this step emphasizes, more than any other event in his career, how aptly balanced in his character were the twin attributes, courage and foresight. Courage married to foresight is the key to his successful progress through life.

He became head of his family also. His elder brothers had long since left home, and he assumed the duties and responsibilities of looking after his young brothers and sisters. His younger sister, Miss Lilian Swift, well remembers as a girl receiving her weekly pocket-money from her adored big brother. It was a rôle into which he fitted easily and naturally, and one which accentuated his appearance of maturity. It should be added that although he himself left the parental roof two years later, he continued to keep up the house, not merely to his mother's death in 1905, but throughout his entire life. (Five of Thomas Swift's children outlived the judge—four of his sisters and a brother.)

Within a few months Swift's bold step was justified. Early in 1900 two newly-called young men came into the chambers, banishing the spectre of the rent-bill; one of them is to-day Mr. Justice Greaves-Lord, and the other, Mr. Benjamin Newman, is now Associate of the Northern Circuit. Throughout that year work increased by leaps and bounds; many of Thomas Swift's old clients transferred their custom to his son, and the more lucrative civil work was beginning to bulk larger than criminal briefs in the pages of the fee-book. That autumn the rising junior—by now fully entitled to that appellation—held his first heavy civil brief (in the lawsuit arising out of the disastrous explosion at the United Alkali Company's works at St. Helens in May 1899), and when the year's accounts were finally totted up he was found to have earned over 1000 guineas. There are not many barristers who can claim to have passed into the four-figure category at the age of twenty-six.

Yes, the year 1900 liberally displayed the gifts of fortune to Swift in compensation for the gloom of the preceding twelve months. His affairs had turned with the turn of the century, and to set the seal upon his happiness came his engagement.

Three years earlier Swift had attended that peculiarly Lancashire entertainment, a hot-pot supper, given to the Liverpool bus-drivers by the wife of a fellow-member of the Bar. There he had met a fair-haired, blue-eyed girl two years his junior, Martha Beatrice Walmsley. Her father had been a shipowner, and she lived with her widowed mother at Allerton. The friendship that sprung up between them quickly ripened into

a deeper affection, and midway through the successful year 1900 Swift felt the future sufficiently sure to enable him to propose marriage, and on the 7th of June 1902 they were married at All Hallows, Allerton. They returned from a honeymoon in the lake district to set up their home at 6 Grove Park, near Croxteth Road. It was a remarkably successful marriage, and the unfolding of Swift's career thenceforward owed not a little to his wife's encouragement and to the tranquil happiness of his home life.

* * * * *

Murder has always, even before the vogue of the modern thriller, gripped public attention, and there is no drama in the courts of law played to a wider audience than a keenly contested murder trial. Swift's name, already well enough known among the Merseyside lawyers, was carried out to the wider Lancashire public by his defence, six months after his marriage, of a prisoner on trial for his life.

It was 2 December 1902 when Swift left his chambers with a bundle of papers marked 'Rex *versus* James Shaw, Brief for the Defence' under his arm. This was his great opportunity, he told himself as he trod the familiar path up to where St. George's Hall towered so majestically out of the winter murk. The Hall's vast, solid beauty—embodying as does no other assize court in the country the imponderable majesty of justice—must have weighed down heavily upon his solemn mind, for behind the tall Doric pillars there awaited the hardest contest an advocate can ever face, the battle with facts, with the life of a fellow-man at stake. This was no Tighe case; there was no foregone conclusion here, nor, if the prosecution were to be believed, were there any extenuating circumstances. If Swift's client were found guilty, he would hang—there was no doubt about that. The prosecution had a deadly story of the shooting of Michael Noonan, a story that was going to be presented before Mr. Justice Jelf by two of the ablest counsel on the circuit, Mr. Tobin, K.C., and Mr. Leslie Scott. The defendant had an altogether different account, and it was Swift's job to make the jury disbelieve the one and believe the other. The young advocate passed within the great doors knowing that he had a formidable task before him, but knowing, too, that from close study of the case he had discovered one or two chinks in the Crown's armour: he intended to keep his eye on those chinks and widen them if it were humanly possible.

The prosecution's story commenced at a public-house, the Boilermakers' Arms, at Sutton, a mining village close to St. Helens. On a night in the previous August the deceased was

THE YOUNG BARRISTER

—AND HIS FIANCÉE

drinking there in company with his brother Thomas and a man named Ashton, when four men entered. Their names were Gayter, Tarpey, Dixon, and Shaw, the prisoner. There was no violence in the public-house, but the atmosphere must have been strained, for the two groups of men formed rival parties, or, in modern parlance, 'gangs'. Shaw's party presently left, and Noonan's party followed. Their state was described by a neutral collier as 'fresh in drink, but not drunk', and Ashton, in reply to Swift, described their intentions in these terms: 'I went out expecting there might be a row and intending to be in it'. When the two parties came together, the row duly took place; it was three to four, but evidently the numbers bore no relation to the odds, for after a few moments the Noonans and Ashton moved off leaving Gayter, Tarpey, and Dixon gasping upon the ground. Shaw had darted off before the end, and presently the victors saw him coming back towards them. It was a black night, but when he got close they saw he was putting a gun together; he cried, "Here's Shaw!", and fired point-blank at Michael Noonan. They closed with him, and after a fierce struggle wrested the gun from him, whereupon he ran off, and spent the night out on the moss. Noonan died of his wounds soon afterwards.

The Crown contended that the prisoner, on leaving the fight, had deliberately gone home to fetch his gun in order to work some mischief. He had not got it earlier in the evening; true, it could be carried under the coat in two pieces, but its presence would have been noticed. 'I am sure I would have noticed it if he had had it,' declared the licensee of the Boilermakers' Arms.

Shaw's story, stolidly told in answer to Swift's questions, was very different. He had had the gun under his coat all the evening. After he left the *mêlée* he saw the other gang following him. 'I saw they were coming on me, and to let them know I had a gun I put it together and fired in the air. . . . When I fired one of them said, "We will have thee and thy —— gun too", and they rushed at me. Thomas hit me twice on the forehead and kicked me on the right hand. They had got hold of the gun, and while they were kicking me the gun went off. . . . I had no intention whatever of shooting Michael.' He had intended to go shooting rabbits at Knowsley that night, he added.

Swift worked away quite coolly at the crevices in the Crown case. First, there was the number of shots; Ashton and Noonan said they heard but one, other witnesses, however, had heard two, to that extent corroborating Shaw's story. Secondly,

there was the carrying of the gun. Swift elicited from a policeman both that Shaw was a poacher and that his gun-licence had expired. Here was motive enough for hiding the gun, and counsel boldly followed this up by having Shaw come down to the well of the court and put the weapon in the capacious ' poacher's pocket ' of his coat.

Its presence could not be distinguished. That daring experiment at once wiped away the effect of the evidence that he had not had the gun at the Boilermakers' Arms.

The third point, and one telling heavily in Shaw's favour, emerged from the Crown's medical evidence. The doctor who had examined the dead man found the wound quite inconsistent with Noonan's and Ashton's account. Swift pressed this disclosure ; ' it was the kind of wound that would have been likely if there had been a struggle ', admitted the witness.

In his final speech Swift hammered home the lesson of the medical evidence and the evidence of the two shots, claiming that in the face of those facts the testimony of Noonan and Ashton had proved ' utterly unreliable '. As for the gun, ' You have seen for yourselves how effectively the gun can be concealed in the prisoner's pockets, and as the profession of poacher is not one requiring advertisement, and as the prisoner's licence to carry a gun at all had expired, it was the most natural thing that he should conceal it on this night. The miserable theory of the prosecution about the gun has utterly failed, but with that theory they have accused the prisoner of a wicked and terrible murder utterly purposeless and useless !

' I have swept away all possibility of a verdict of wilful murder. I demand the acquittal of the prisoner ! '

Jelf J. summed up ' somewhat against the prisoner ', to quote a contemporary account. But after fifty minutes' discussion the jury found a verdict of ' not guilty '.

Shaw walked stolidly out of the dock and across the road to Lime Street Station, where he took the first train home to St. Helens. His counsel went home too, but not quite so stolidly. He was left limp after the two hardest days' work of his life, and he could not help thinking of the very different journey his client would have taken if matters had fallen out otherwise. . . .

' It was clear ', wrote the *St. Helens Advertiser*, ' that Shaw's defence was very thoroughly prepared and most ably conducted.'

* * * * *

Rigby Swift was by now a very busy man. His fees passed the 2,000-guinea mark in the next year, and exceeded 3,000 in 1904. In the last-named year he moved to larger chambers

on the ground floor at 25 Lord Street. Greaves-Lord and Newman had left the old chambers after two years, their place being filled by Mr. O. G. Morris, who stayed throughout Swift's Liverpool career and is, happily, still practising there.

In the larger premises Swift had more tenants, and commenced to take pupils. Among those sharing his rooms at one time or another were the late Humphrey Nelson, the late Franklin Holland, F. E. Bodel (of whom more anon), Alfred Elias, who after the War went to the U.S.A. and practised in Kansas City, R. E. Whiteley, Charles Rae (who reversed Thomas Swift's procedure and became a solicitor, now retired), and Gilbert Thompson, now a Liverpool stockbroker. The amount of work had now long since necessitated the presence of more than one clerk; many of the 'juniors' who entered the world of law under Mr. Evans's surveillance have made good in their department—e.g., W. H. Harris, Mr. Justice Singleton's clerk, and H. Lewin, formerly clerk to Mr. A. T. Miller, K.C. One of the juniors who was *not* a success was found in tears by Swift when he visited chambers on the morning of his wedding-day. He had been given notice. Said Swift: "The notice must be withdrawn. I am not having my wedding-day blotted with tears.'

Swift's closest neighbour, the tenant of the chambers immediately above him at 25 Lord Street, was a young man whose success had startled even Liverpool, used as that city was to soaring careers, a young man named F. E. Smith. He had come to the Bar four years after Swift, but already his rocket-like progress was carrying him upward at a pace that makes Swift's speedy climb seem pedestrian. The two men became close friends, although their period of propinquity at 25 Lord Street was short—Smith had by 1906 found Liverpool too small for him and departed for London. Swift led F. E. on one occasion in 1901 when they were briefed together in a four-day arbitration about dilapidations. Swift's brief on that occasion was marked 50 guineas and F. E.'s 30 guineas.

In 1904 Tobin left Liverpool for London, releasing a great deal of work to Swift. In 1909, when from the same process the competition of Greer, Leslie Scott, and F. E. Smith had ceased, Swift had become the leading junior of Liverpool. He was thirty-five years of age.

The days of 'dockers' and 'soups' were now far behind, and Swift was making frequent excursions to London to deal with cases taken to the Court of Appeal or House of Lords. Once he appeared before the Lords with Asquith as his leader; he returned much dissatisfied with that eminent man's methods.

In this, his hey-day at the junior Bar, he made a lasting reputation as an advocate of tact, wit, and independence. As one of his associates of that time has written to the present writer, 'His ability as an advocate in those years was remarkable; he had the faculty of knowing exactly how a case should be presented; his tact was superb; and his success with jurors was unquestioned'. They remember those days yet at the Liverpool Bar, how he used to walk up and down addressing a jury in that rich accent of his, tossing up a scrap of paper and catching it again and again, and how he used occasionally to come out with odd turns of phrase—as when once he asked 'What did he do then, gentlemen? He ups with his bag and he off with it!' His insight into juries' minds was uncanny; it was born of a natural sympathy with them and an innate understanding of how an ordinary man's mind worked. His background helped: he was no refined young man condescending by addressing them to give them the benefit of his superior station and education, he was one of them, he was *bourgeois*—*bourgeois* raised to the *n*th degree. His mind was clear as crystal, and, being clear, it could clarify for others. No man ever knew better the virtues of simplicity. Once, briefed for a plaintiff injured when an omnibus ran into a wall, he rose to cross-examine the bus-driver. The driver had explained the accident by saying he had swerved to avoid a dog. If any expected a brilliant cross-examination riddling this excuse, they were disappointed. Swift asked one question:

'Was it a *nice* dog?'

Those five words won his case, taking right home to the jury the central point in the action—that no man should endanger human lives for the sake of a dog.

It was as a jury advocate that Swift liked to be known, and undoubtedly conjuring with facts and reasoning with juries was his forte. From this sprung his pose of not being a learned lawyer—if he had to have law-books in court he would keep them out of sight under the desk. Because the world takes us at our own valuation, a fallacy of his ignorance of law arose and persisted all his life. It was quite untrue; his knowledge of the law was wide and comprehensive and his memory for decided cases was remarkable. This he owed to his father's grounding and to guidance in his early days from that deeply learned barrister, the late Judge A. P. Thomas. Thomas once watched him argue a point of law in the Crown Court at Liverpool, and commented, 'Swift has a very little brain but it moves very quickly'. (Rigby took size $6\frac{7}{8}$ in hats.)

Many stories are still told of his independence. Once an

anxious solicitor called at his private house at midnight with a brief. He knocked up Swift, and explained his mission through a bedroom window. 'Mr. G——,' came the answer, 'my working hours are nine to six. I am not a midwife.' Bang went the window! Another solicitor when dining with Swift thought he would turn the occasion to advantage by securing some free advice. He tactfully put a 'hypothetical case', and was delighted when his host responded with a splendid opinion. As he was leaving, Swift asked him, 'Do you know what that opinion I gave you is worth?' adding, as the other cast about for some flattering reply, 'just what you are paying for it! Good night!'

Already he was developing that gift for repartee that was so to enliven his days upon the Bench. On one of his visits to London he went with his friend, now Mr. Justice Greaves-Lord, to dine at a Soho restaurant. Their table was close to the coat-rack, and when an elderly Frenchwoman came to fetch her coat, Swift gallantly helped her on with it. She was unable to resist a flash of coquetry: 'If only your wife could see you now!'

'She also has a mother,' replied Swift.

It was almost as difficult to get the better of Swift in verbal battle as it was to make him angry. His frequent opponent of those days, Cuthbert Smith, once did both. They were in a case before Swift's old leader, Bigham, then recently become a High Court judge. One of Bigham's peculiarities was always to rise at 4.30 in the afternoon, no matter what was happening. Smith was not doing too well, and decided to send up his stock by a little stratagem. He kept his eye on the clock, and a few seconds before 4.30 he said roundly, 'Swift, please don't keep smiling at the jury!' Immediately Bigham rose and left the Bench. Swift was furious: 'You little upstart! If you do that again I'll knock your head off!'

But outside in the corridor he waited for five minutes. He then sent for a cab. On hearing that it had arrived, he went to the robing-room and took Cuthbert by the arm: 'I've got a cab outside, let's go home together'.

Five minutes was as long as his anger ever lasted.

CHAPTER THREE

SILK GOWN IN LONDON

'As a junior work was difficult; as a silk it was easier.'

IN the year 1909 Swift's fees topped the 5,000-guinea mark. That represented as great a measure of success as the Liverpool Bar could offer, and inevitably the question presented itself to him whether he should seek the wider horizons of London. For the second time in his career he was faced with a crucial decision. The risk of leaving Liverpool, where he was known, successful, and pre-eminent, for London, where he would be unknown and one among many, was obvious; yet that way, and that way alone, lay further advancement. This problem was vexing his mind when in January 1910 he went to Ruthin Assizes to appear in a case before Mr. Justice Pickford. Now, the future Lord Sterndale was one of those older giants of the Liverpool Bar whom Swift had known, watched, and admired in his student days. Perhaps some survival from an adolescent veneration accounted for his never being easy in his mind when appearing before him—he once confessed that Pickford was the one judge he feared. However that may be, the two men were the best of friends, and when the judge on this occasion asked him to lunch at the lodgings, he took advantage of the opportunity to seek his advice. This was readily and unequivocally given, and it was—'Go to London!'

With his mind made up, he awaited a favourable opportunity for the move. This presented itself the following autumn, when T. G. Horridge was appointed to the Bench; Swift took over his chambers at 1 Garden Court, in the Temple, and moved his household to a new home at 17 Kidderpore Avenue, Hampstead. At about the same time he sent in to the Lord Chancellor his application to be made one of His Majesty's counsel.

So in the October of 1910, at the age of thirty-six, Swift made the change from the Lancashire to the national stage. The days of the keen young junior of Liverpool were put behind, and he could permit himself to look forward to the time when he could write the initials K.C., M.P. after his name.

He had already made one attempt upon the second of those attainments. In the previous December he had been adopted as Conservative candidate for his birthplace, the borough of St. Helens, and had contested the election in January 1910. Though it had a good tradition of Unionist success, St. Helens was an evenly poised constituency, the closeness of its contests being reflected in the Unionist majorities of 217, 59, and 609 recorded in 1886, 1892, and 1895, respectively. With the twentieth century it had fluctuated more widely, the Unionists having a 1,898 majority in 1900 and Labour winning the seat in 1906 by 1,411 votes. Now in 1910 Swift and his wife flung themselves with enthusiasm into the task of restoring the borough to its ancient allegiance. This, it will be remembered, was the Budget election, and tremendous issues, social, financial, and constitutional, were in the balance. In the forefront of his election address Swift put Tariff Reform, following this with support of the House of Lords and an attack upon the Licensing Bill. A significant passage stated, 'I am a profound believer in the necessity of every nation possessing a National Church. I regard with deep distress the effort of the present Government to disestablish the Church in Wales.' With characteristic bluntness he ended with, 'I conclude my address to you with a few words as to my personal qualifications. I am a lawyer. My opponents point to this fact as something to my disparagement. I only reply that in sending a representative to make your laws you had better have somebody who knows something about law than somebody who knows nothing and cares less.

'I am a St. Helens man. My father (who was well known to you or your father) was a St. Helens man. I was born in the town; my early days were spent in the town. I trust my future years will be spent on behalf of the town.'

The campaign was conducted fiercely and rowdily, but despite a brilliant incursion by F. E. Smith at Swift's eve-of-poll meeting amid 'scenes of enthusiasm previously unknown in the town', it was found when the smoke had cleared away that although the Government and its supporters had lost over one hundred seats, St. Helens was not among them. The sitting member—Thomas Glover, who had begun life as a pit-boy and was one of the founders of the Miners' Federation—was returned, the figures being:—

Glover	6,512
Swift	5,717
Labour majority	795

The Unionist candidate, who was reported as being 'in the

best of spirits' after the declaration, was able slyly to mingle condolences upon the reduced majority with his congratulations to the winner.

As events turned out, Swift had every reason for viewing the political future with the best of spirits. That Parliament lasted only eleven months. The Prime Minister, determined not only to force the Budget past the Lords, but also to prevent the Upper House ever again obstructing the Government, introduced the Parliament Bill, and for the second time in a year the Liberals went to the country upon a great constitutional issue.

Swift again stood, and again a frenzied campaign was conducted, some of the supporters of either side being carried by their enthusiasm to greater extremes than the candidates desired. T. P. O'Connor descended upon the constituency to denounce Swift's 'religious intolerance'—an allegation promptly refuted by Swift as 'the worst kind of lie'; while the *St. Helens Reporter* (Conservative) screamed that Glover was a modern Pecksniff, a master of cant and humbug. It was afterwards described as one of the fiercest elections ever contested in a red-hot constituency. Amid this welter of high feeling the town went to the poll on 6 December. That evening the streets round the Town Hall were blocked with shouting, singing citizens, who suddenly hushed when at 9.15 p.m. the Mayor came on to the steps to announce the result.

Rigby Swift . . .	6,016
Thomas Glover . . .	5,752
Unionist majority .	264

A terrific cheer greeted the victory. Back in the Town Hall Swift, reduced to *clichés* by election exhaustion, said: 'You have struck a glorious blow for the unity of the Empire, for the commercial prosperity of the community, for the happiness of the people, and I trust that God will give me strength to discharge the trust you have reposed in me'. He thanked his opponent for his scrupulous fighting. Glover said dourly, 'The reason I have lost this election is because of the scurrilous language that has been sent out about me. I thank my opponent for saying he has had nothing to do with it.' Swift was then carried shoulder-high to his committee rooms, where the enthusiasm was reported to have 'rendered the lady-workers wellnigh hysterical'. The crowds in the streets did not disperse until after midnight.

The contest had an unfortunate sequel in a libel action brought by the defeated Labour candidate against the

St. Helens Reporter. The action was settled by the defendants withdrawing their allegations, apologizing in open court, and paying Mr. Glover's costs.

* * * * *

The year 1910 may be bracketed with 1895 and 1929 as one of the outstanding years of Rigby Swift's life. Within the twelve months he had fought two elections, become an M.P., conducted one of his heaviest cases—the Whitehaven colliery inquiry, shortly to be mentioned—and effected the transfer of his private and professional life to London. It was not, however, a time of unalloyed success. Greatly to his disappointment, his application for a silk gown was refused by Lord Loreburn, the Lord Chancellor—no doubt in conformity with the custom then obtaining that provincial counsel should practise for a space in London before taking silk. Swift's lifelong friend Greer was made a K.C. at this time, thus preserving the lead over Swift which he always maintained. In later days, after they had both ascended the Bench, Swift at a Lancastrians' dinner complained whimsically of this lead: 'All my life I have followed Lord Justice Greer, but I shall never catch him up. When they made him a judge, I was given a similar appointment a year or two afterwards, but no sooner had I got comfortably settled in my job than they made Mr. Justice Greer a Lord Justice. I suppose if any one ever talks about making me a Lord Justice they will send Lord Justice Greer to the House of Lords.'

However, with silk, as with Parliament, it was a case of second time lucky, and in October 1912, in the next list of new K.C.'s, the first issued by Lord Haldane, his name appeared. Sixteen other barristers were given their silk gowns at the same time, the most junior of them being Swift's future chief, then plain Gordon Hewart.

His new gown cost him £60 12*s*. in fees and stamp duties—an investment destined to return handsome dividends. There was little doubt that he would succeed as a silk, for of the two classes of common-law work, the drafting of pleadings and the preliminary conduct of actions on the one hand and the conducting of cases in court on the other, he had always preferred and excelled in the latter, and the latter is the work to which a silk is called almost exclusively to devote himself. Indeed, in his last years as a junior he had often been briefed as though he were a silk, and with fee to match. The exchanging of the stuff for the silken gown is always to some extent a gamble, and many a barrister of great promise as a junior has ruined his career by being called within the Bar, but Swift

could feel that he was making the gamble with the odds well in his favour. It is true that his earnings showed a marked decline at this time, but that was due not so much to his new status as to the move to London. In 1911, the year in which he practised as a junior in London, his fees totalled less than those for 1904.

His outstanding briefs at this time were largely in 'heavy' cases of little interest at the present day. In May 1910 there had been an appalling disaster at the Whitehaven colliery, when an explosion and fire occurred in the workings under the sea, cutting off 136 miners, only four of whom managed to escape. An official inquiry was held in the following November and for sixteen days Swift there represented the case of the mine-owners. His junior on that occasion was an ex-pupil of his, F. E. Bodel, a young Irishman whose slight stature and mild appearance concealed a valiant and tenacious spirit. He joined up at the outbreak of war, and after being gazetted Captain and winning the Military Cross, he was killed in action leading the Inniskillings at Ypres. Swift had a great affection for 'Beetle', as he always called him, and he obtained and carefully preserved his young friend's regimental badges and medals when they were sent back from France.

Swift was also briefed in the Wallasey incorporation inquiry and the Birkenhead Local Government Board inquiry. Lucrative work, but, to those not actively interested, dull. Closer the limelight was his defence in April 1912 of Peter Smith, a prominent Liverpool education official charged at the Assizes with forgery and larceny, the sequel to irregularities discovered in his department. It was a complicated case, and Rigby threw himself heart and soul into it, giving what many of his friends considered to be his greatest forensic performance up to date. After the three-day trial had ended in the triumphant acquittal of Smith on all charges, Mr. (now Sir) Edgar Sanders, then clerk to the Liverpool city justices, wrote, 'Congratulations on what I consider your greatest triumph at the Bar. . . . I hear on all sides that your cross-examination and speech were most masterly. . . . You richly deserve all the praises you are getting to-day.' Swift had the unusual experience in this case of leading his godfather, the late H. Linden Riley, who, though much senior to him in years, was his junior at the Bar. He was another St. Helens solicitor who, like Thomas Swift, had migrated to the Liverpool Bar.

It was in the same Assize Court that a little later he had what was extremely rare for him—a passage-at-arms with a

THE WHITEHAVEN COLLIERY DISASTER, 1910

Swift (CENTRE) *about to descend the mine with his junior,*
F. E. Bodel (RIGHT)

judge. Ordinarily his tact and strict regard for propriety ensured him a courteous hearing, in no matter what tribunal he found himself. On this occasion, however, he came before Ridley, a judge whose appointment by Lord Chancellor Halsbury had been much criticized—the cynics used to say of Halsbury that he only appointed to the Bench 'persons of tried incompetence'. (Once in court Ridley said, 'Mr. Swift, I am going to tell the jury that the law in this case is thus and thus'. Swift: 'My Lord, I am going to tell the jury it is so and so'—the exact opposite.) On this occasion Swift was cross-examining a witness when Ridley suddenly stopped him, terming the question 'childish'.

Stung by the injustice of the epithet, Swift retorted, 'I have been childish for a good many years. It is my client's misfortune, not his fault. It is not a good thing for anybody to be childish when they come before your lordship!'

'I really cannot allow this to go on,' interposed Ridley.

By now Swift had recovered his poise. Abandoning anger for irony, he inquired, 'Does it occur to your lordship that it is just possible that I know something about my case?'

* * * * *

These briefs were all in his old territory, and in his first years in London the effect of his decreased income was accentuated by the expense and fatigue of continuous travelling back and forth between Lime Street and Euston. Once after a midnight journey south, on which he had complained of having been troubled by mysterious snores, a mislaid tobacco pouch necessitated a thorough search of his sleeper, and this revealed the curled-up form of a sleeping small boy, who had 'stowed away' at Liverpool. Swift refused to take any part in having the boy punished; he gave him half a crown for his breakfast and made the officials promise to send him back forthwith.

However, as time went on, London solicitors began to take cognizance of the young K.C. and gradually London work came his way. His first big case in the metropolis came in the summer of 1913, when he was briefed as second leader for the defence of the late Cecil Chesterton in the celebrated libel trial before Phillimore J. at the Old Bailey. This trial, representing the law-courts' share of the upheaval popularly known as 'the Marconi scandal', has so often been described that there is no necessity to dilate upon it here. Swift with two juniors was led by one whose friendship was among the first fruits of his move to the Temple—Ernest Wild, K.C., later to be Recorder of London and knighted. Wild had

chambers on the same staircase as Swift at 1 Garden Court and the two men had taken silk at the same time; propinquity had led to acquaintance, and acquaintance to a friendship lasting until Wild's untimely death in 1934. Opposing them was as formidable a team as ever conducted a prosecution—Carson, 'F. E.', and Richard Muir—the last-named destined to figure in many famous trials presided over by the judge who now as a silk of eight months' standing was opposing him for the first time.

Chesterton had in his paper, the *New Witness*, set down the rumours about Rufus Isaacs and Godfrey Isaacs with such baldness that instead of the civil proceedings more usual in libel cases a criminal prosecution was launched. Swift's part in the trial consisted in cross-examining certain Crown witnesses, among them the Postmaster-General, Mr. Herbert Samuel (as he then was), and Senatore Marconi. He also called G. K. Chesterton and asked his opinion upon his brother's character, to which that worthy replied, 'I can only say I envy him the dignity of his present position'. Cecil Chesterton was found guilty, and ordered to pay a fine of £100 and the costs of the prosecution.

Though Swift's way with juries led him from time to time into these criminal cases, he was never a purely criminal practitioner, nor indeed did such trials form more than a small proportion of his work. All through his years of success he avoided undue specialization and kept a well-balanced and almost variegated common-law practice. He would be hurrying from the taut drama of the Old Bailey to the leisured argument of the House of Lords, or following up some commercial dispute in the High Court with an appearance in one of those long arbitrations or inquiries of which the public at large know little, but which bring very solid grist to the legal mill. Throughout his London career he was in demand in Workmen's Compensation appeals, and towards the end of his time at the Bar he became known as a 'special jury man'—that is, one in demand in the important civil cases tried by a special jury. Many of these were libel actions in which he was briefed by newspaper defendants; but though he excelled in this lucrative class of work, he would not confine himself to it, and in his last year at the Bar, as in his first, he had his briefs in the courts he most enjoyed appearing in, the criminal courts.

Soon he was to have experience of criminal trials from a fresh angle. In 1915 the Recordership of Wigan, the oldest borough in the County Palatine, fell vacant. This was one

of those South Lancashire towns he knew so well, and he applied to the Home Secretary for the appointment. He received it, and in January 1916 he journeyed north to preside for the first time over the borough's Quarter Sessions. There were no prisoners for trial on that occasion, a fact which meant white gloves for the Recorder, but no briefs for the Bar. Despite this, many barristers attended in order to add a circuit greeting to the Mayor's official welcome.

One passage in Swift's reply to this welcome is significant when it is recalled that this was his first pronouncement from the Bench, and that in after-years he was known as a wise, humane, and successful criminal judge. He said: 'Those who form the class of the community who come up to be dealt with here fall into that class for various reasons, many through misfortune, many through the exigencies of the moment, and some few, I believe, from a superfluity of that naughtiness which is to be found in every man. But whatever might be the cause, one thing is certain, there is some good spark in every one of us.'

Few boroughs can show such a list of distinguished Recorders as Wigan. Swift had been preceded by William Court Gulley, Q.C., afterwards Speaker of the House of Commons and later Viscount Selby, by Sir Joseph Walton, Q.C., afterwards Mr. Justice Walton, and by Sir Lancelot Sanderson, K.C., M.P., afterwards Chief Justice of Bengal and now a member of the Judicial Committee of the Privy Council; and he was to be followed by Mr. F. Boyd Merriman, K.C., M.P., now Sir Boyd Merriman, President of the Probate, Divorce, and Admiralty Division, by Sir Reginald Mitchell Banks, K.C., now a County Court judge, and by the present Recorder, Mr. William Gorman, K.C.

Swift was extremely proud of his place in this hierarchy, and it was unwise to make any of the proverbial jests concerning the borough in his presence. Once when he was Assize judge at Oxford, a shy undergraduate was asked to lunch at the lodgings. The young man had never seen a live barrister before, let alone a real judge, and was much too awed at first to contribute to the conversation. After the initial course had passed in silence, there came the second, a choice between chicken and tripe, which led the judge to observe what a pity it was that so excellent a dish as tripe should be debased by the popular metaphorical use of its name. Whereat the undergraduate, feeling it was high time he said something, and suddenly remembering a song about 'Wigan where the tripe comes from', remarked, 'Yes, it is

associated with Wigan, isn't it?' Swift drew himself up and said, 'Young man, that is the rudest remark I have heard at my table for several years. I was Recorder of Wigan!'

It took all Lady Swift's tact to rescue him: 'I have never been so covered with confusion in my life,' he says. It should be added that he and the judge became firm friends and that he went marshal to the judge several times.

It was war-time now, and both in Parliament and out Swift contributed his share to the national exertions. He sat on many war-time boards and commissions and one of these jobs is disclosed in the following letter of thanks:—

MINISTRY OF MUNITIONS OF WAR.
6, *Whitehall Gardens*,
S.W.
25*th November*, 1915.

DEAR SWIFT,

Now that the work in connection with the selection of skilled munition workers from Military Units in the United Kingdom has been completed, I am anxious to convey to you my thanks for the part which you have taken in this important work and my appreciation of the time and trouble you have given. The results of this personal canvass have been most encouraging, and the work has been admirably organized and executed. As a result of this campaign, a large body of skilled munition workers has been made available for munitions work, and the value of this accession of strength to the workshops of this country can scarcely be over-estimated. The success of the scheme has been largely due to the valuable co-operation and assistance rendered by gentlemen like yourself who have so freely and spontaneously given their services in this important work.

Yours sincerely,
D. LLOYD GEORGE

Rigby P. W Swift, Esq., K.C., M.P.,
17, *Kidderpore Avenue*,
Hampstead, N.W.

* * * * *

Before the end of the war, Rigby Swift had arrived in the front rank of his profession. He was one of the leading King's Counsel in the country, he had been made a Bencher of Lincoln's Inn in 1916, and his fees reached 10,000 guineas in 1916.

He disliked the over-work which such popularity involved, and instructed his clerk to try to stem the flood by increasing the fees; in 1918 he made a minimum charge of 100 guineas to go out of town, and raised this to 200 in the next year. But to no avail; the more he charged, the more solicitors seemed anxious to secure his services. Money meant little to him—his personal needs were simple and his one extravagance was generosity towards those who had any sort of claim upon him or seemed to him to need help. 'Don't you call the cab,' he would tell his clerk, 'send that fellow over there for it—he looks as though he could do with half-a-crown.' He was always lavish with tips. His was no mere unthinking generosity, however: once at Liverpool he was accosted on his way home by a man who begged from him, saying he was out of work. Swift looked him over and refused money, but said: 'Come to my house to-morrow morning and I'll give you a day's work'. The upshot was that the man was employed by him from that day until he moved to London years afterwards. There is no doubt that his open-hearted generosity accounted for the comparatively small sum at which his estate was sworn after his death.

Another means by which he tried to diminish his work was to institute a rule that he would take only one case a day—in contradistinction to the habit of many leaders, especially of that period, to be in a number of cases simultaneously, bestowing but scant attention upon each. This did cut down the midnight oil, but it failed to check his rising income because solicitors, eager to retain a leader whose services they found they could exclusively count upon, marked still higher figures upon his briefs. Before he ascended the Bench his annual income had passed 15,000 guineas, and would certainly have gone considerably higher had he continued at the Bar; he was only eight years a silk.

What accounted for this achievement? Nothing succeeds like success, and it was Rigby Swift's ability in securing verdicts that brought the clients knocking at his door at Garden Court. His success in court was due to the same factors that had thrust him to the head of the Liverpool Bar: to his mastery over facts, his clarity of exposition, his imperturbability, and his independence, virtues coalesced and crowned by that quality of character that for lack of a better word is usually termed 'personality'. The present Lord Chancellor, Lord Maugham, has said, 'Most judges are agreed that those counsel who have learnt the art of compression are the most successful'. Swift had done that. Facts are the

jury advocate's raw material, and he was a master of facts; he would pluck the salient facts from a case, ruthlessly trim off the superfluous, shape them, cut down again, and clothe them with the minimum of words so that they stood out clear and unmistakable for the jury's comprehension. There was no oratorical garnish, nothing to waste effect by diverting attention from the matter to the manner. *Ars est celare artem*, and when you listened to Rigby addressing a jury you heard no forensic fireworks, no oratorical tricks; you witnessed ideas being passed from the mind of the advocate to the mind of the jury with the minimum of loss in transmission.

He could not be put out when conducting a case. His wit cloaked him against vexation and his optimism against depression. A case was never lost till it was over, and it was never too late to fight. A solicitor once at 6.15 in the evening brought him a heavy brief for the next morning in the House of Lords. Swift cut short his apologies: 'It isn't late, we have all the night before us. It's only late when they hand you the papers after the case has been called on!'

He was a personality; hostile witnesses who beheld him standing in the silks' row, bluff, four-square, genial, knew instinctively that he had taken their measure and that lies or evasions would have no success; timid witnesses found it easy to confide in the friendly counsel who seemed to understand their difficulties; jurors when he spoke to them in that rich and individual voice of his felt as though he were standing with his back to the fire in their favourite bar parlour and giving the reasonable solution of some current problem while they enjoyed their evening glass. Twinkling eye, ruddy face, understanding mind, pleasing voice, these were the attributes enabling him to throw an aura of bonhomie over a forum and secure the sympathetic hearing necessary to convert his carefully erected structure of crystalline facts into victory for his client.

This air of comradeship that he breathed doubtless accounted for that adaptability which conferred upon him so varied a practice. How quickly he could adapt himself to a strange tribunal is shown by his one appearance before a court whose unfamiliar procedure and alien atmosphere often prove disconcerting to those few barristers who find their way there. This was when he was briefed towards the end of 1917 to defend a young officer charged before a court martial on the Western Command. No type of professional mind could be further removed from a lawyer's habits of thought than the soldier's, yet Swift immediately established sympathetic con-

tact with the court: 'He impressed all the officers present as being a man of great personal charm and in all ways first class'—that is how the officer who acted as judge-advocate on that occasion remembers him. He adds that Rigby Swift was different from the other counsel he had encountered. 'In the first place, he appeared before the court in wig and gown—a courtesy that other barristers in those war days habitually neglected. He referred to the President in Parliamentary terms as "learned and gallant". He kept his somewhat obstreperous junior in very good order, and he made a remarkable appeal for his client to which I have little doubt the young officer owed the retention of his commission.'

That was not the only time Swift defended a soldier. The courts, faithful mirrors that they are to current conditions, saw a whole series of cases born of war and aftermath of war, and Swift's share in the series included two of his greatest cases, the defence of General Cowans before a special tribunal, and the famous defence of Colonel Rutherford against the charge of murdering Major Seton.

CHAPTER FOUR

BIG BRIEFS

. . . A good-humoured style of advocacy, eloquent without being flamboyant, tactful without being sycophantic, firm without bitterness. . . .

THE TIMES.

GENERAL SIR JOHN COWANS was the war-time Quartermaster-General, and as such was charged with the feeding, clothing, and supplying of the 5,000,000 British soldiers fighting on all fronts. This herculean task he performed with signal success, and whatever hitches may have occurred at the War Office during the War, no breakdown ever threatened in the Q.M.G.'s department. To his own administrative ability he added the capacity for picking able subordinates, and he bids fair to go down in tradition as the greatest administrator in British military history. It is fair to say that what Samuel Pepys was to the seventeenth-century Navy, Jack Cowans was to the twentieth-century Army.

With Pepys he shared another and less meritorious characteristic, the love of feminine society. Women were Cowans's relaxation, the recipients of his overflowing kindness, the revitalizing source he seemed to need to keep his work going at its tremendous pressure. His relations with women were singularly catholic; on the one hand he contracted innumerable casual liaisons—his philoprogenitive proclivities being compared by one of his friends with those of Augustus the Strong of Saxony—but, on the other, he was capable of forming lasting friendships with ladies of irreproachable reputation. One day he would be seen lunching with a reigning society hostess, and on the next with one of what he used to call his 'little bits'. That he could thus make the best of both worlds was an oblique tribute to his great charm of manner. Warm-hearted and generous, he loved doing kindnesses to his friends.

Since the majority of his friends were lady friends, it was not surprising that gossip arose of petticoat influence in his department, while there were those who hinted that the story of Pepys and Bagwell's wife had been re-told there more than once. That there was some sub-stratum of truth below all the rumour may be deduced from General Battersby's statement that 'It was disconcerting, when an important piece of

business was being considered, to find that [a lady] was at the back of the decision arrived at',[1] and also from an entry in the diary of his colleague the Director-General of Movements: 'Cowans wrote very nasty minute to Osborne [Director of Movements] because he did not get a lady friend of his out to India, contrary to instructions. This gentleman will get the push one of these days with his women friends if he is not more careful.'[2]

Against this reputation as background the great Cornwallis-West affair was painted. Had it not been for the persistent undercurrent of gossip and suspicion that Cowans's manner of life engendered, the comparatively trivial incidents it embraced would have been passed over, not perhaps in silence, but certainly without the unprecedented inquisition launched against the Quartermaster-General. As it was, the matters became so magnified as to furnish Swift with perhaps the most important case of his forensic career, and to require all his tact and penetration to prevent his eminent client from 'getting the push' and his client's department from suffering a consequent disorganization that might well have influenced the course of the War.

The Cornwallis-West affair centred round the promotion and transfer of a young officer, 2nd-Lieut. Barrett, of the Royal Welsh Fusiliers. He had been a sergeant in the regiment, and had been recommended for promotion by his Commanding Officer, Lieut.-Col. Delmé-Radcliffe, his claims being supported by Col. and Mrs. Cornwallis-West, and by Cowans, an old friend of theirs. What next happened was summarized by the Court of Inquiry in these words: 'Probably before this time, and certainly later, Mrs. West began to take a more than ordinary interest in Mr. Barrett, to which he consistently failed to respond, and eventually he wrote her, in February last [1916], a letter of remonstrance, which she placed in the hands of his Commanding Officer, Lieut.-Col. Delmé-Radcliffe. This officer took the matter up as one of discipline, and decided to apply for Mr. Barrett's transfer to another battalion.' He also censured his subordinate.

Two friends of Lieut. Barrett's, Mr. Birch, who was agent for the Cornwallis-West family, and his wife, felt that the young man was being unjustly victimized, and they brought the facts to the notice of Sir Arthur Markham, M.P. Hearing of this move, Mrs. Cornwallis-West appealed to Cowans, who

[1] *General Sir John Cowans*, by Chapman Huston & Rutter, Vol. II, p. 155.

[2] *The War Office at War*, by Sir Sam Fay, p. 150.

immediately wrote and telegraphed in her support to the C.O., and subsequently wrote to Mrs. West, saying :—

' Orders have gone by wire for B. to be transferred at once to the 3rd Battalion. It is really all we can do. . . . I think all has been done that can be done by us officially—as it would never do for us to mix ourselves up in private quarrels and misunderstandings. I am very sorry, but I am sure you will understand this—I would fight for you if I had time.'

Lieut. Barrett took his transfer as official confirmation of his C.O.'s censure, and his health, already impaired, became worse. Sir Arthur Markham then took the matter up with Mr. Lloyd George, then Secretary of State for War, who not unnaturally decided that these charges, together with another that had been brought to his notice, ought to be investigated.

And investigated it was, in spectacular fashion. Instead of an ordinary inquiry, the affair was raised to the level of a State trial ; the aid of both Houses of Parliament was enlisted, and a special measure—the Army (Courts of Inquiry) Act, 1916—was hurried through Parliament authorizing the setting up of a special tribunal to probe the charges in secret. In form this was done by an amendment to the Army Act authorizing civilian members to be appointed to an ordinary army Court of Inquiry, and authorizing civilian witnesses to be summoned. In effect a majestic *ad hoc* tribunal was created for the sole purpose of investigating the alleged scandal. The members appointed to constitute this court were Field-Marshal Lord Nicolson, President, and Major-Gen. Lord Cheylesmore, Mr. Justice Atkin (now Lord Atkin), and Mr. Donald Maclean, M.P. Not since the Parnell Commission had so imposing a body sat to inquire into a State scandal ; truly a vast machine for the cracking of this small nut of gossip.

The Court sat at the Middlesex Guildhall during September and October 1916, and ponderously sifted the allegations of wire-pulling and improper influence. Since the proceedings were secret, it is not possible to refer here to the evidence.

Swift had been consulted by Cowans as soon as the scope of the inquiry became evident, and he threw himself wholeheartedly into the defence of the General against this new-style ' impeachment '. He was able at the hearing to dispel the miasma of misunderstanding hitherto clouding the case, and to separate the great amount of prejudice bound up in it from the small residue of fact. He was able to establish that the order for Lieut. Barrett's transfer had been made in the ordinary official course before Cowans had concerned himself in the case at all. Thanks to his ability to establish sym-

pathetic contact with the military mind, he was able to put his contentions clearly before the court, and eventually to summarize his case in a speech of great power and effect. He explained the worst feature in the essentially trivial case against the General—the letter to Mrs. Cornwallis-West—as a hurried note carelessly dashed off without much thought, an explanation receiving striking confirmation in the phraseology of the letter he received that same night from his grateful client. An extract reads: 'I didn't half thank you for your most lucid and true oration this morning; as I was really quite feeling a lump in my throat—Never have I had to be defended before and remain silent—and it was a trying moment. . . . I owe you a deep debt of gratitude, and every word you spoke simply rang of truth which had nothing to hide—nor had I. . . .'

The truth is that the Q.M.G. habitually wrote with the carelessness of colloquial speech, and it was unfair to construe a note of his as though it were a carefully-phrased document.

Of course no advocacy could conceal the fact that Cowans had been meddling in a matter which was not his official concern, and in their final report the Court described his conduct as 'a departure from official propriety'. That this was a mild reproof can be gathered from the severity of their comments upon some of the other participants in the affair; Lieut.-Col. Delmé-Radcliffe had, they found, allowed himself under the influence of a lady of position in his county to deny justice to one of his own junior officers, and Mrs. Cornwallis-West's conduct they stigmatized as 'highly discreditable'. 'We think that whatever influence Mrs. Cornwallis-West may have had over Sir John Cowans, the lady exaggerated it. We have no doubt that her injudicious boasting of the power she wielded at the War Office, which was, however, confirmed to an appreciable extent by the wording of some of Sir John Cowans's letters, was calculated to bring him and the administration of the War Office into disrepute.'

It was announced in the House of Commons on 22 December that the Quartermaster-General was to be retained in his position, but was to be informed of 'the displeasure of the Government' at his acts.

* * * * *

Swift's other defence of a soldier was conducted in the blaze of publicity that always attends a contested murder trial. Its story commences at ten o'clock on the night of 13 January 1919, when Mr. William Hunter is sitting in his office at the Villiers Street, London, branch of the District

Messenger Company. Into that office strides a tall man dressed in the uniform of a Lieutenant-Colonel of the Royal Army Medical Corps. He asks to see a London Directory. He is unable to find what he wants, and asks Mr. Hunter to look up for him the address of Sir Malcolm Seton. Mr. Hunter does this and tells the inquirer that the address is 13 Clarendon Road, Holland Park. He watches him depart from the office, and is a little surprised at his fidgety and nervous manner.

The fidgety officer is Lieut.-Col. Norman Cecil Rutherford, who won the D.S.O. for conspicuous bravery in an advanced dressing-station at Ypres in 1917. He departs for Holland Park knowing that Sir Malcolm Seton is entertaining his cousin Major Miles Seton. Presently he is knocking at the door of No. 13, asking for Major Seton, and being admitted by the parlourmaid. Sir Malcolm and Lady Seton and the major are in the smoking-room on the first floor, and on hearing that a visitor is inquiring for him, Major Seton goes down to see him in the dining-room immediately underneath. His hosts overhear a rumble of conversation going on for some fifteen minutes. Then without warning a number of sharp reports echo through the house. The Setons rush downstairs. They find their cousin lying wounded on the hall floor and through the open dining-room door they see a tall officer standing rigidly beyond the dining-table. On the table are a cap, and gloves, and a pistol.

'Did you do this?' they cry.

'Yes.'

'You have killed Miles!'

'I only wish I had another bullet for myself.'

Lady Seton sits on the floor and takes the dying man in her arms. Her husband runs out for a doctor. Lady Seton is alone with an apparent murderer, who is pacing up and down the room. Presently she hears the click of a revolver.

'Put that down and come here,' she commands.

He does so.

'Promise not to touch that revolver again!'

'I promise.'

She takes the weapon and puts it on the floor under her skirt.

Col. Rutherford sits down at the table with his head in his hands.

After fifteen minutes the police and a doctor come. Major Seton is dead, and Col. Rutherford is taken away, charged with his wilful murder.

* * * * *

Something of the background of the tragedy appeared when Col. Rutherford came up before the magistrate and Sir Archibald Bodkin opened the Crown case against him. Major Seton, it seemed, had long been a friend of the Rutherford family, and had often visited the colonel and his wife. He had also visited their house at times when the colonel was away in France, one of these occasions being the Christmas week prior to the shooting. Letters written by Mrs. Rutherford were read in the police court; written towards the end of the previous year, they upbraided the prisoner for cruelty and spoke of proceedings against him for divorce. Sir Archibald said that the colonel had returned from France on 6 January, and on the night of the killing had left home suddenly after a stormy scene with his wife. The discovery of Major Seton's visits to the house in his absence, coupled with the letters, continued counsel, might have given the prisoner a suspicion, whether well founded or not, that his wife had been unfaithful to him. . . .

Col. Rutherford was committed for trial, and his solicitors went down to the Temple to confer about the defence with the two men they had determined to brief, Swift as leader, and another future judge, Mr. Travers Humphreys, as junior. The public, which had followed the committal proceedings with intense interest, had little doubt what that defence would be. Here was another of the all-too-common cases of a brave soldier whose home had been broken up while he was absent on his country's service. It was just like the recent trial of Lieut. Malcolm, who had shot his wife's lover and been acquitted. The 'unwritten law' would certainly be invoked here. The whole thing was really very simple and elemental.

But in real life things are rarely as simple as they seem, and in point of sober fact Crown theory and public speculation were alike completely wide of the mark. It is true that there were some among the accused's friends who urged that the 'unwritten law' be prayed in aid. There is, of course, no such defence in English law, 'unwritten' being in fact a synonym for 'non-existent', and the expression being nothing more than a misleading euphemism for the view held by some people that a husband is justified in killing a man who invades his marital perquisite. Malcolm had been acquitted because the jury had found that he had acted in self-defence; no such line appeared possible here, where the evidence pointed to the shooting of an unresisting and perhaps unsuspecting victim. To apply the so-called unwritten law here would be to acquiesce

in a verdict of guilty and then trust to the clemency of the Home Secretary in granting a reprieve. Though the last factor was quite unpredictable, this course did have the superficial attraction that it would at least render the trial simple, for the defence would be a mere dotting of the prosecution's i's and a crossing of its t's, and conflict would be minimized.

That course was not taken because it did not fit the facts. When the solicitors for the defence came to investigate the case, they found that it was not an 'eternal triangle' case, it was not an 'unwritten law' case, it was not a case of jealousy at all.

Col. Rutherford, when his advisers interviewed him in prison, denied with great emphasis that he had ever entertained any suspicions whatever of his wife, and categorically forbade any defence suggesting that he had.

His attitude has been greatly misrepresented. It is said in the biography of Sir Richard Muir[1] that 'Rutherford himself repeatedly and violently insisted that the plea of justification should be raised. He desired to attack his wife in the course of the trial and to harm her in every possible way. . . . Both Mr. Rigby Swift and Mr. Travers Humphreys stated that they would throw up their briefs if they were not allowed to conduct the case as they thought fit.'

Each of the above assertions is the diametrical opposite of the truth. The present writer has been at some pains to satisfy himself of this, and he is authorized by Col. Rutherford to say so.

But if the motive for the shooting was not jealousy, what, then, was it? The answer the prisoner gave to that question led to the dispatch of mental specialists to Brixton Prison to examine him, and to the gradual formulation of the real defence in the case, the defence of insanity.

There were long and anxious consultations at Temple Gardens before that defence was finally adopted. Swift was a little chary of it at first, knowing as he did how the law has lagged behind medical science in its dealings with mental diseases, knowing, too, what a heavy burden of proof it casts upon the defence. But the solicitors worked away with great energy amassing what Swift always asked of solicitors—facts. Little by little they unearthed details of past events and occurrences, some of them insignificant by themselves, but adding together eventually into a sum total convincing the advocate that he had at last the ammunition with which to wage this forensic battle, the greatest perhaps of his career. Thereafter

[1] *Sir Richard Muir*, by S. T. Felstead, p. 246.

he threw all his energies into the defence, mastering the recondite learning of the alienists and soaking himself in the subject until he could transmute the medical opinions into simple language finding ready entry into a juror's mind.

The trial commenced on 7 April before Mr. Justice Salter in that court of many tragedies, Court No. 1 at the Old Bailey. Swift's adversary was one with whom he had so often crossed swords since they had taken silk together—Hewart, now become Sir Gordon Hewart, His Majesty's Attorney-General; the prosecution juniors were Sir Archibald Bodkin and Mr. (afterwards Sir) Percival Clarke. The jury heard again from Mr. Attorney's opening speech of the tragedy at the house numbered 13 on the 13th day of the month. From the facts, counsel passed to motive. Why had the prisoner gone to Holland Park? 'That was no motiveless act! There is no motive which can be sufficient for murder, but there are motives which we know act with great and compellant force upon the minds of men, and of those motives are there any stronger than those of jealousy and revenge?

'It is a case of murder deliberately planned, thoroughly carried out, and appreciated by the doer both in the sense that he knew what he was doing and that he knew the immoral nature of the act.'

The Crown witnesses followed one another into the box, piecing together the prosecution case. Swift cross-examined them all except that brave woman, Lady Seton. From all whom he cross-examined, except a police-inspector, he elicited some evidence of strangeness on the part of the prisoner. The police-surgeon thought him paranoiac; a colleague who had seen him in the previous June thought him restless, fidgety, and uncomfortable; a former governess to the Rutherfords' children related how after she returned from a visit to a theatre with Mrs. Rutherford and Major Seton, Col. Rutherford had turned her out of the house; a house-parlourmaid from the Rutherfords' house told how in the autumn of 1917 she had hidden the prisoner's revolver, fearful lest he harm his wife—'he had an uncontrollable, fiendish temper'—and how he had torn up any photographs of men found in the house; he was depressed, she said, between his return from France on 6 January and 13 January; they had had several visitors at Christmas, and Major Seton stayed because he could not get a room at a hotel, as had been planned.

At the conclusion of the case for the prosecution on the second day, the court undoubtedly felt that there was something queer about the prisoner. But, the jury must have been

thinking, queerness on the night of the 13th at any rate was explicable—they would hardly feel normal themselves if they had emptied a revolver into a man's body. And strangeness of manner is not enough to justify a verdict of insanity; the law casts upon a defence where insanity is pleaded the burden of proving that at the time of committing the crime the prisoner was 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know that what he was doing was wrong'.

Swift stood up and told the jury the heavy task before him. He knew that an advocate who glosses over adverse facts cannot succeed, and that a sure way to a jury's heart is to acknowledge the strength of the opposing case at the outset and to secure their sympathy as with a good man struggling with adversity. He told them the legal definition of insanity; he told them of the heavy burden of proof cast—and rightly cast, he said—upon those who sought to establish insanity.

Then, his voice changing, he told them how he proposed to discharge that burden. He told them of a history of eccentricity both in the prisoner's family and in his career, he told them of violent and unreasoning incidents in the prisoner's life in the army, he told them that as a medical student his client had contracted a virulent form of dermatitis which constantly exacerbated him and caused permanent insomnia, he told them what eminent doctors thought of the case, and how the very doctor at the prison where Col. Rutherford had been kept since the crime thought him insane at the time of its commission. That was his defence, but in case the jury had been influenced by the Crown's reiteration of the revenge motive he took Hewart's damning reference to jealousy, and turned it completely round in his favour; 'The Attorney-General has said that jealousy and revenge are motives which act with great and compelling force upon the mind. They do. Sane men, men with all their mental faculties, men with complete power of self-control, have been driven by jealousy and revenge to do things which the law forbids and which the law punishes. But if jealousy and revenge have that effect upon the mind of the sane, if they are so great and so compelling in regard to normal people, how much greater is their influence, how much greater is their compulsion, when they enter minds that by heredity, disease, infirmity, or strain and stress of long service under fire at the front have been brought into a state in which they

are not like the minds of ordinary people, but are easily liable to be influenced, easily liable to be broken down!'

Then he called his long procession of witnesses, starting with the prisoner's brother (' his aunt died in a lunatic asylum '), and continuing with his friend and former teacher, Professor William Wright (' his wife showed me a letter of his in 1917; it was the letter of a madman '), a fellow-officer in the R.A.M.C. (' extraordinary outbursts of temper in France; concluded he was suffering from a mental warp '), another officer ('he was buried by a shell '), his batman (' constant insomnia '), his groom (' a horse fell on his head '), and a former fellow-student at Edinburgh (' his fiancée visited him at Edinburgh; a walk was suggested, but he would not go, and his fiancée and I went for an hour's walk; on our return he was furiously angry with her and would not speak to me ').

Finally Swift called two of the greatest alienists in the country, Dr. F. H. Edwards, of Camberwell House Asylum, and Dr. Hyslop, late senior physician at the Bethlem Hospital. They both held the opinion that Rutherford was of unsound mind on 13 January. Dr. Hyslop gave some remarkable evidence of the results of his examinations of the prisoner and his conversations with him. Since the previous December Col. Rutherford had had recurring nightmares, in which he dreamt he was killing Major Seton. Witness had asked Col. Rutherford what Major Seton had done which would justify taking his life, and he had replied that Major Seton had had an evil influence over his children. Asked in what way this was evidenced, he had replied, ' When in France I heard they were quarrelling among themselves '. Asked, ' Do you consider that sufficient to take his life? ' he replied, ' I did '. Asked if he had any doubt as to the relationship between Mrs. Rutherford and Major Seton he had replied, ' No, I have always had perfect faith in my wife '.

' He is not sorry for what he has done,' said Dr. Hyslop, ' he is glad he has done it. He has slept well ever since. He has got a feeling of tranquillity which he has not had for months.'

Swift knitted his case together in a masterly final speech. He had proved, he said, that the prisoner was from the start abnormal, and his abnormality had been wrought upon both by his dermatitis and consequent sleeplessness, and by the letters he had received from his wife. ' When he left his home that night he was insane, and he is not responsible in law for the action which has brought him into the dock.'

By the time he sat down there was little doubt what the

verdict would be, and the summing-up and the five-minute retirement of the jury seemed mere formalities. ' Guilty but insane ' was the finding—a verdict with which the judge expressed himself in complete agreement. The prisoner was sentenced to be detained until His Majesty's pleasure be known. He was in fact detained in Broadmoor for some years, until his affliction was cured, after which he was released. Thanks in the first place to the skill of his legal advisers, and secondly to the expert treatment of his malady at Broadmoor, a gallant officer was restored to an honourable place in the community.

The remarkable feature of the trial was the veering of public opinion that necessarily accompanied it. What started as an assumed *crime passionel* ended as a case for the alienist. As the *Medical Press* said : ' The proceedings at the police court had made it appear that the crime was one of a cold-blooded and deliberate nature. This impression having become general, based on a motive which seemed under the circumstances to be adequate, the case was in a measure prejudged against Col. Rutherford. It must have been therefore with some surprise to those who had accepted this view, to gather from the evidence given at the Old Bailey how mistaken was the conclusion at which they had arrived.'

The case is a salient example of the unfairness of holding committal proceedings in public. This practice—unknown in the saner jurisprudence of Scotland—often results, as here, in harmful premature publicity to one side, the prosecution side, of a case, and when there comes—as assuredly it must some day—an agitation to end this source of injustice, I trust that the lesson of the Rutherford case will not be forgotten.[1]

The professional paper already quoted also observed, ' Not only was the trial from the medico-legal point of view a notable one, but one the verdict in which was obtained by the display of a forensic skill unusual in our courts of law '. Swift's masterly steersmanship of his case through the treacherous currents of the trial earned him widespread admiration ; of all the tributes he received he valued most that from the man best qualified to judge of his success, his instructing solicitor, Mr. O. A. Hempson, who wrote :—

' I appreciate the difficulties of the case and the necessity there was for dealing with it with the greatest delicacy and

[1] Cf. the prejudice of the Rouse trial of 1931 caused by publicity accorded to facts mentioned before the committing justices but not proved at the trial : *Reasonable Doubt*, by G. de C. Parmiter, p. 68.

skill, and realize that the result attained was due to your efforts and diplomacy.'

Like many another famous trial, the Rutherford case had a sequel in another court, in this instance the Divorce Court. Though Swift was not concerned, it is desirable to note this sequel shortly, firstly because the legal history of the matter is thus rounded out, secondly because the subsequent proceedings, concerning as they did a case in which he had been so intimately concerned, exerted a profound influence in forming the advanced views upon divorce for which Swift was later to become celebrated, and thirdly because they do justice to one who had perforce to remain mute during the criminal trial. Mrs. Rutherford, with a friend murdered and a husband on trial for his life, had had to live through the case with her grief accentuated by the innuendoes put upon the evidence. She could not answer; neither side called her as witness, and though Sir Richard Muir watched the case for her, he was not entitled to intervene. The judge had been kind, noting in his summing up that her letters, read in the case, were not those of a woman guilty or accused or defending herself, but the trial as a whole did less than justice to the innocent party to the marriage so tragically broken on 13 January.

When in the following year Mrs. Rutherford lodged a petition for divorce, the public heard for the first time her story—a story of a married life continually marred by the husband's outbreaks of physical violence to the wife. The petition had a chequered career; it was based on allegations of cruelty and adultery, and Branson J. found both proved and granted the decree, whereupon the woman named appealed, and the Court of Appeal, holding her innocent of the misconduct alleged, rescinded the decree; Mrs. Rutherford carried the case to the House of Lords, and though her appeal there failed, it succeeded in eliciting from Swift's old colleague, F. E. Smith, by now Lord Chancellor Birkenhead, one of the most outspoken passages to be found in the sober pages of the law reports. Announcing the failure of the petitioner's appeal, he said:

'It is an unfortunate circumstance that she should thus be tied for life to a dangerous, violent, and homicidal lunatic, after having for many years suffered, both in body and in spirit, from his cruelty. . . . To some this may appear a harsh, and even an inhumane result; but such, my Lords, such is the law of England. . . . The true remedy lies outside any court of law. . . . It rests with Parliament, if and

when it thinks proper, to end a state of things which in a civilized community, and in the name of morality, imposes such an intolerable hardship upon innocent men and women.'

That judgement was given in 1922; fifteen years later Parliament, assisted—as subsequent pages of this book will show—by Swift's equally forthright utterances, did think it proper to end that state of things.

One of the first to take advantage of the Matrimonial Causes Act, 1937, was Mrs. Rutherford, whose decree nisi, based upon Mr. Justice Branson's former finding of cruelty, was granted on 2 June 1938.

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Rigby Swift's next great case found him again sitting beside Sir Gordon Hewart, but as colleague this time, and not as adversary. He and Mr. G. A. H. Branson (now Mr. Justice Branson) were briefed with the Attorney-General to represent the Air Ministry before the Select Committee appointed by the House of Lords to inquire into the circumstances connected with the dismissal of Miss Violet Douglas-Pennant from the Women's Royal Air Force. The committee, presided over by Lord Wrenbury, sat day after day for the best part of a month, inquiring minutely into allegations too numerous and detailed to be summarized here. It was a Cowans case on a grander and more public scale.

That was towards the end of 1919; in the following January Swift received the biggest brief of his career. This, however, did not share with the preceding ones the limelight of publicity, for it dwelt in the penumbra to which public opinion consigns commercial disputes. Tried in the Manchester Chancery Court before the Vice-Chancellor of the County Palatine, it caused no excitement, and is now utterly forgotten. The plaintiffs in it were the creditors of a company in liquidation, the Hare Spinning Company, and they were suing Sir John Leigh and a number of other cotton magnates, claiming a declaration that the defendants had conspired to defraud the spinning company. Dealings in cotton waste may not be as exciting as a murder; nevertheless vast sums of money and great reputations hung upon the outcome of the trial, and the best legal talent in the kingdom was enlisted for the contest. Leslie Scott, K.C., and Douglas Hogg, K.C. (now Lord Justice Scott and Lord Hailsham) led for the plaintiffs, and among the array of defence counsel were Swift, Sir John Simon, Patrick Hastings, and Cyril Atkinson (now Mr. Justice Atkinson). It was a gargantuan case in every way; the formal pleadings ran to 137 pages, Leslie Scott

spent five and a half days making his opening speech, and Swift's brief was marked with a fee of 1,500 guineas, together with 100 guineas a day as refresher. It was, in fact, the largest fee he ever earned (for comparison it may be mentioned that his brief in the Chesterton case had been marked 250 guineas and in the W.R.A.F. inquiry 500 guineas).

As a contest the trial was a dismal failure. It never got really under way. It had hardly started, having reached only its twelfth day, when the plaintiffs' case collapsed, and they meekly consented to their claim being dismissed with costs.

Though he did not know it, Swift had then in January 1920 but a little time left at the Bar. He was not in Parliament now. In the General Election of December 1918 St. Helens had gone back to Labour after one of the most gentlemanly contests in the country. Swift's opponent was another son of the town, the late 'Jimmy' Sexton. He and Swift had been staunch friends ever since Swift had refused to accept a brief for Larkin in the libel action brought against the latter by Sexton, and each found the task of attacking the other in approved election style more than difficult—indeed, the supporters of either side were not a little embarrassed by the candidates' habit of dining together during the campaign. When the votes were counted the result appeared as follows :—

James Sexton . . .	15,583
Rigby Swift . . .	11,689
Labour majority	3,894

On hearing the result Swift clapped Sexton on the shoulder, and fishing from his pocket the key to his locker at the House of Commons, he pressed it into the victor's hand, saying, 'I may as well finish the job in style!'

'Believe me,' says Sir James Sexton in his autobiography—'believe me, I treasured that key as something more than a mere means of turning a lock.'[1]

Swift's feelings at losing his seat were mixed: one side of him was bitterly disappointed at being denied the privilege of continuing to serve his native town, but another side of his mind appreciated that there were compensations. 'You will now be able to devote yourself entirely to your practice, and I prophesy that in three years you will be either the leading silk in London or a judge,' wrote a friend after the election. Besides that, he had begun to suspect that politics were not his real metier. He had sat now on the back benches at Westminster for eight years, sitting usually

[1] *James Sexton, Agitator*, p. 249.

in company with his Lancashire friends, Harold Smith and—until he gravitated to the front bench—Gordon Hewart. What he saw should have convinced him that the House was not his forum. He acknowledged it afterwards: 'Politics and law don't go well together', he said in 1929. 'They meet hourly and quarrel violently. I can count on my fingers the men who have succeeded at both. My experience is that constituencies love lawyers, but Parliament hates them.' Moreover there were some aspects of political life that were actively distasteful to him. He hated self-advertisement and notoriety and never courted popularity; when his sister, Miss Lilian Swift, became matron of a hospital, he told her, 'Don't try to be popular. If you do your work satisfactorily you won't be popular with those under you.' He *was* popular, but it was the genuine popularity bred of character, and not the synthetic article that politicians are supposed to encourage. He refused, for instance, to put down questions in Parliament for the sake of advertisement; if a constituent of his brought forward some matter which he thought should be dealt with, he would go direct to the Government department concerned and ask them to put it right, instead of taking advantage of the occasion to see his name in the papers coupled with a question in the House.

There were some who grumbled at his uncompromising attitude, and felt he should have nursed his constituency more assiduously and devoted more care to his correspondence with the electors. Their murmurs were extremely *sotto voce*, however, for after the election he was unanimously invited to become the prospective Conservative candidate again. But to the great regret of the St. Helens Conservatives, he refused. He refused because he disliked the flamboyant side of politics. 'I recognize I have very many demerits both as a candidate and as a member of Parliament', he said when returning his negative answer to the meeting that invited him. But he knew, as his audience knew, and said, that those demerits were the emblems of a straightforward nature and that in the real work of an M.P. he had served his constituency well and conscientiously. 'With the exception that I agree that I was not a polite letter-writer, I have nothing to regret', he told them.

It was extremely fortunate for Swift that he was not re-elected. Had he been he would not have been made a judge, for the Government would not have risked a by-election in so uncertain a borough. He used afterwards to say whimsically that he owed his judgeship to not answering letters.

CHAPTER FIVE

THE YOUNGEST JUDGE

You and I are old colleagues, competitors, and friends.
F. E. SMITH.

ON the Monday of Ascot Week in 1920 Swift found himself in Mr. Justice McCardie's court briefed to defend an action over the ownership of a racehorse. The horse was 'Happy Man', and belonged, or had belonged, to Swift's client, Mr. Fred Hardy, the well-known owner. The plaintiff, Mr. John Joyce, also well known on the turf, said that he had bought the colt, and he employed the advocacy of that rising young silk, Mr. Patrick Hastings, to argue his contention. Hardy denied that there had ever been a sale.

The case commenced in the afternoon, and Hastings had barely concluded his first speech by the time the court rose. The next morning a feverish note crept into the proceedings. It was the opening day at Ascot, and 'Happy Man' was entered in the Ascot Stakes, to be run at 2.30 p.m. Suppose he were to be placed? Whose horse was he? Could the case be finished by then?

The morning dragged on. The first witness went into the box. Hardy slipped out of court, beckoning Swift to follow.

'I can't stand it,' he said. 'You must settle this case on the best terms you can. I'm going to Ascot.'

Swift consulted with the other side, and presently was able to announce to the judge that the action had been settled upon the terms that Hardy would retain the horse, paying to Joyce the sum of £1,000 and taxed costs.

As his client was hurrying away, Swift stopped him: 'Put a pound on "Happy Man" for me.'

Hardy put on a considerably larger sum on his own account, and arrived at Ascot in time to see his colt come in first—at twelve to one. His winnings sufficed to defray the entire expenses of the lawsuit.

The next day Swift received two messages. One took the form of a letter from Hardy and was accompanied by a cheque for £12, the proceeds of the bet. The other was conveyed by

the Lord Chancellor's secretary, who called to announce that the Lord Chancellor proposed to recommend Swift's appointment to be one of the justices of the King's Bench Division.

'Happy Man' was indeed the watchword of that memorable day!

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In 1920 the King's Bench Division was sadly in arrears with its work. There were 895 cases awaiting trial at the commencement of the Easter Term, as compared with 650 at the same stage in 1910, while the judicial strength of the division was depleted by the continuous absence of one judge on loan to the Divorce Division, where the arrears of petitions had risen from 141 to 1,388 in the same decade. Fifteen judges staffed the K. B. Division, but it had been provided by the Judicature Act of 1910 that two appointments above that number could be made if Parliament presented an address praying that this be done.

Accordingly, on 16 June, the Attorney-General, Sir Gordon Hewart, moved the House of Commons to present such an address. The motion passed, and the address having been presented, it fell to the lot of the Lord Chancellor to appoint the two additional judges. The Chancellor at that time was Swift's old Liverpool colleague, F. E. Smith, whose meteoric career, unmatched in modern times, had shot him past Swift's steadier ascent and had thrust him, at the early age of forty-seven, to the extreme pinnacle of the legal profession. Swift had of course written congratulating him when he received the Great Seal, and had received the following typical reply.

HOUSE OF LORDS.
S.W. 1.
Jan. 30, 1919

MY DEAR RIGBY,

I hope you will forgive me answering your kind congratulations in a dictated form and by the aid of a typewriter. My friends, however, have been kind enough to write to me in such numbers that, with the other work I have to do, it would be absolutely impossible to answer every letter in my own hand-writing.

I was very pleased to receive your letter. You and I are old colleagues, competitors, and friends. Our fathers were well acquainted. We have competed at the Bar now for nearly twenty years, and in the early days with all that strenuous zeal which young men, ambitious of success, properly employ. Yet, looking back, in all that time I do

not recall one angry word or one unfriendly thought on either side. This recollection fills me with pleasure.

Yours sincerely,

F. E. SMITH

Lord Birkenhead—as he became four days after that letter was written—thought that Swift would not refuse one of the vacancies. Indeed, Rigby had told a friend not long before that the height of his ambition was a High Court judgeship, when he could live in the country, and do a little farming. 'F. E.' was thus able to gratify the life's ambition of an old friend and at the same time make an appointment to which no one could take exception. It was said of Birkenhead, of course, that he favoured unduly his old circuit friends—the suggestion was bound to be made, for all four of the King's Bench judges he appointed were Northern Circuit men—but it is perhaps permissible to say without presumption that the test of time has shown that Birkenhead made his appointments not so much because he knew the men as because, knowing them, he knew their ability. Swift certainly had every outward qualification for judgeship. He was a leading silk with a first-class practice and a good knowledge of law, and—a factor more important then than now—he had rendered good service in Parliament to the party in power. But something more than these is needed to qualify a man for the Bench, and the most difficult part of a Chancellor's task is to gauge the hidden inward qualities that produce the successful judge. It is hoped that the succeeding chapters of this volume will provide the answer to the question whether in this instance the Lord Chancellor gauged correctly.

It was announced on Monday afternoon, 21 June, that the two new Judges would be Mr. Rigby Swift, K.C., and His Honour Judge Acton. (It was significant that the month was June, for Swift had always regarded it as his lucky month; he had been born, called to the Bar, married, and appointed to the Bench, all in June.) They were sworn in the next day before a Bench consisting of those three famous judges, Mr. Justice Darling, Mr. Justice Avory, and Mr. Justice McCardie. 'I do swear that I will well and truly serve our Sovereign Lord King George,' so runs the time-honoured formula, 'and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God.' Swift was pleased and proud at the honour accorded to him: 'If only my old father were alive now!' he had said to his clerk that morning. When he stood up in the court crowded with well-wishers, he was observed to exhibit signs of the ner-

vousness that he could never completely conquer. His voice trembled as he repeated the words of the oath, and his hand was seen to shake as he signed the roll. He was then forty-six years of age, and became the youngest High Court judge.

Among those who stood within the Bar, watching the ceremony, was the new judge's old friend and competitor, Gordon Hewart. As Attorney-General, Hewart was the head and leader of the Bar which Swift had just left. In less than two years he was again to become Swift's chief, and to preside in this court where he was now spectator—the Lord Chief Justice of England's court.

Three days later it was announced that the honour of knighthood had been conferred upon the two new judges. This was in accordance with the precedent laid down by George III, who decreed that all judges, save those already of noble blood, should receive a knighthood 'to keep up the reputation of the ancient order of knights bachelor'. Swift and Acton were received at Buckingham Palace on 12 August and knighted by King George V.

With him onto the Bench Swift took his clerk, Mr. Archibald Evans, who had, as we have seen, been with him from his earliest student days. Together they had grown up in the law, together they had moved to London, together they now assumed the dignity of the Bench, and together they were destined to continue until the judge died. How close was the friendship engendered by this life-long association was seen when the judge's will was read and he was found to have appointed 'my friend and clerk, Archibald Evans' to be one of his executors.

* * * * *

And so in those summer days eighteen years ago Mr. Rigby Swift, K.C., became the Honourable Sir Rigby Philip Watson Swift, one of His Majesty's Justices of the King's Bench Division. The change in his designation reflected the change in his career. Short though it is, the step from Bar to Bench bridges a great gulf and marks the commencement of a completely new life, attended by an alteration in habits of work and daily routine and necessarily in habits of mind as well. It is a revolutionary, and it may be a perilous change. A new judge enters upon what is to all intents and purposes—except that its ambit is still within the law—an entirely new profession. It demands a fresh outlook and brings altered hours of work and altered remuneration, and he is forced to accommodate himself to these at a time of life hardly suited to abrupt change. He must shed with his barrister's gown the long-cultivated habit of partisanship, and put on with his judicial robes the mask of

impartiality. Having accustomed himself to work, it may be, from dawn to midnight, he finds himself faced with the problem of utilizing the leisure allowed him by the moderate working hours of a judgeship. Accustomed to a large income, he—and his wife—may find it necessary to budget for one half or one quarter of their former revenue; High Court judges receive £5,000 a year, and many a new judge has paid away his entire first year's salary in income tax on his previous year's earnings.

Upon a man thus faced with the reorientation of his whole life there is conferred dignity, responsibility, and authority. And therein lies the peril of the change. As the brother of the present Lord Chancellor has written: 'Even the most sensible person can very easily get above himself: grant him certain privileges, and before you know where you are he will claim them as his inalienable right; lend him a little authority and he will play the tyrant'. Mr. Somerset Maugham's aphorism applies in full force to the Bench; a judge has more than a little authority, and more than an ordinary temptation to play the tyrant, and at the same time he is freed from all effective outward restraint. At the Bar a man must keep well within the bounds of propriety or he will incur the public displeasure of the Bench and the loss of his clients. Such checks vanish when he puts on the scarlet and the ermine, for he is now secure in office for life, removable only after an address from both Houses of Parliament. He is now sensitive to a far less degree than before to the pressure of his fellows' opinions. Henceforth whatever restraint prevents him from exploiting the authority of his position must come from within his own breast. The force of this restraining factor is one of the principal hidden elements in character that a Chancellor must weigh when making his appointment.

Inevitably the authority of his position affects the character of each recruit to the Bench. For better or for worse he is not the same man that he was before. Some it makes humble, some pompous; some it makes intolerant, some benign. One recalls the instance of the very eminent judge whose great intellectual powers rendered him so rude to the slower-witted mortals who argued before him that lawyers, shortly before the War, refused to appear before him unless he mend his ways. At the other extreme one may recall the more recent case of the judge who was quite literally killed by responsibility and died within three years of taking office, worn out by the anxiety of making decisions.

What would his exalted office do with Swift? Time alone

would tell. Meanwhile his well-wishers looked forward with high hopes.

From the Press he received a unanimous welcome. *The Times*, in a leader approving the speedy response to Parliament's address, said, 'No appointment could meet with greater approval—we might even say enthusiasm—in the legal profession and among the public than that of Mr. Rigby Swift. His qualifications for elevation to the Judicial Bench are undeniable. A good lawyer, with what might be called a dainty and a good-humoured style of advocacy, eloquent without being flamboyant, tactful without being sycophantic, firm without bitterness, no man ever accepted one of the most difficult of professional positions with greater promise of success. He should make at once a scholarly, a businesslike, and a human Judge. His was an obvious choice for promotion. It was generally expected.'

'The appointment of Mr. Rigby Swift is a popular one,' stated the *Daily Telegraph*: 'his legal progress in London has been rapid, particularly in the last four or five years. It would be tedious to enumerate the big cases in which he has appeared; they have been many, and the interest taken in them has been very largely due to Mr. Swift's exceptional incisiveness and genial methods of advocacy.' 'Mr. Rigby Swift has long been marked out for a judgeship, in what might be called the apostolic succession to other Lancashire men'—thus the *Daily Mail*. 'He still keeps the deliberate Lancashire drawl. But it goes down with London juries, while the imperturbable Lancashire manner, confident and never hurried or "rattled", is worth hundreds of guineas to a client. Mr. Swift is not yet fifty—a mere infant for a judge. His keen blue eyes looking out upon law-court life from under bushy eyebrows recall memories of Mr. Justice Walton. His friends predict that he will be an equally able judge.'

Somewhat more breezy were the comments in Lancashire. The *Bolton Evening News* omnisciently observed, 'He is quite a good lawyer, but not in the same street as Douglas Hogg, for example. He usually goes about with a log of timber in his mouth. He told me once it was a pipe.'

* * * * *

The many friends who were convinced that Swift would be as successful on the Bench as at the Bar could point to many factors supporting their belief. For one thing, he had a strong physique and excellent health. It later became apparent that his years of overwork as a silk had left their mark upon his

ON THE LINKS

Swift and Lady Swift at the Bar Golfing Tournament at Deal, May 1926

constitution, but at this time and for long afterwards his health was good.

He was fond of sport. The Rugby football of his youth had given way to golf, at which he now had a handicap of 14. Until he gave up the game in 1933 he played regularly for the cup presented by the late Lord Justice Scrutton for the annual competition of Bench and Bar. He himself later presented a prize to be played for by the clerks of the Temple and the Law Courts. He had cause to be grateful to golf, for the game introduced him to Crowborough and to the little estate that became the abiding interest of his private life. He went down to Crowborough in 1914 to play a round on the links on the slopes of Beacon Hill. He at once fell in love with the place, and started going there from time to time for holidays. In 1917 a house with 17 acres of grounds on the crest of Beacon Hill and adjoining the golf-course came on to the market. Swift bought it, and moved there from Hampstead. The house was called 'Kiona'; small and unpretentious, it exactly filled his wants, and there he and Lady Swift lived for twenty years. They had always wanted a country life, they had always felt a longing for the elemental happiness that comes not so much from living in the country as from participating in the life of country folk, from growing and breeding and watching the weather and tackling the problems of a farmer's daily round. Now their wish was gratified: the grounds of 'Kiona' became a model small-holding, where Beatrice Swift looked after her herd of Jerseys and bred turkeys and geese, and Rigby Swift went in for pigs and pigeons. The pigeons became a feature of 'Kiona'; white fan-tails lived on the roof, and in the paddock a large loft accommodated over a hundred homing pigeons. Neighbours followed the Swifts' example, and presently the judge was able to organize pigeon races and give prizes. . . . Visitors to 'Kiona' would rarely find their hosts indoors; they were pretty certain to be found somewhere in the grounds, surrounded by inquisitive West-Highland terriers, attending to the animals, or superintending some improvement to the gardens, or playing croquet, or perhaps just sitting in the sun enjoying their home.

Swift loved 'Kiona' with all the ardour of the townsman turned country-dweller, and henceforth it filled what space in his thoughts was not occupied by his first love, the law. And as time went by he and his wife were able to reach through their love of their home something else very dear to them. This was the tacit leadership of this little Sussex community. The village must have been a trifle sceptical at first of this strangely

spoken Northerner who had come to live among them. But it was not long before his open-heartedness and his wife's charm were winning them an ever-widening circle of friends of all classes through this lovely rolling countryside. As the years went by they came slowly and unconsciously, and almost imperceptibly, to occupy a position of leadership. It was a leadership not bought by wealth nor derived from tradition ('Kiona' is no manor house: it was built in the 1880's), but arising spontaneously out of respect and trust on the one hand and acceptance of responsibility on the other. So it came about that Lady Swift was the organizer of Crowborough's first Poppy Day, and took a leading part in the local Red-Cross Society and the Cottage Hospital, while the judge, when the depression came, helped to form a Crowborough and District Unemployment Relief Committee, and in happier years presided over the village committees for the celebration of George V's Jubilee and George VI's coronation. . . .

At the time of Swift's appointment these things lay far in the future—though even then, after three years' residence, he was already serving as Captain of the institution that had first attracted him to Sussex, the Crowborough Beacon Golf Club. He served a second turn in the succeeding year. Up to June 1920, however, it had been a matter of regret to him that the demands of his practice had kept him from the full enjoyment of his little kingdom: after giving up his Hampstead house he had taken a suite of rooms at the Grosvenor Hotel at Victoria, and 'Kiona' saw him only at week-ends and in vacation time. But now all that would be altered. Henceforth he lived, except when on circuit, at his country home, travelling each working day the 42 miles to London—by car to Tunbridge Wells, by train to Cannon Street, and by taxi or on foot to the courts.

For him, then, the new judge's problem of how to employ his new-found leisure was solved. With good health, with the companionship of the other party to that ideally happy marriage, and with a home that had become a hobby, he was assured the peace of mind that would be so great an asset upon the Bench. He had other assets too. He had his rare knowledge of human nature, a knowledge instinctive, no doubt, in origin, but sharpened and deepened by a quarter-century's practice in the courts. A further tremendous asset was his positiveness. He made his mind up quickly and without hesitations or reservations. Once at a dinner-party a lady inquired whether he did not find it difficult to make his decisions. 'As life goes on,' he replied, 'life becomes easier. As a junior barrister work was difficult. As a silk it was easier. Now that I am a judge it is simple.

Something here '—he tapped his forehead—' tells me what is right, and I do it.'

'And if I am wrong,' he added, 'there is always the Court of Appeal to put me right!'

His judicial qualities were soon to be put to the test. Awaiting trial at the September Sessions at the Old Bailey was a defendant named Mrs. Bamberger, whose case bade fair to be what it did in fact become, the *cause célèbre* of 1920. Swift's old friend Greer, who had beaten him by fifteen months in the race to the Bench, was to take the cases in the judge's list. But so heavy was the calendar on this occasion that the unusual course was adopted of despatching a second judge to the City. Swift was sent to preside over the trial of Mrs. Bamberger.

CHAPTER SIX

THE TRIAL OF MRS. BAMBERGER

'I spend the greater part of my time on the Bench deciding whether I can avoid sending people to prison.'

IT was universally conceded that Mrs. Thelma Dorothy Bamberger was a beautiful young woman: 'All are agreed about her good looks and personal attraction', said Swift at her trial. Her appearance before him was the sequel to her appearance six months earlier before another recently-appointed judge, Sir Henry Duke, now Lord Merivale, who had become President of the Probate, Divorce, and Admiralty Division in the previous October.

These two appearances caused what was subsequently described as the 'matrimonial and amatory history' of this lady to occupy a large share of the attention of the newspaper-reading public during 1920, and they were in turn the sequel to a brief appearance she had made three years previously before yet another judge, Mr. Justice Horridge, in the capacity of petitioner for a divorce from her husband, Henry Theodore Bamberger. The petition had been undefended, and Horridge J. had duly granted a decree nisi. The King's Proctor, however, had interested himself in the suit, and after protracted inquiries he had intervened, asking that the decree be rescinded. It was this intervention that was heard before Sir Henry Duke in March 1920.

The King's Proctor's case was that Mrs. Bamberger had not disclosed to Mr. Justice Horridge the fact that she herself had committed misconduct, and he alleged adultery with four men named Robert Wemyss Symonds, Ernest Stein, and two others. An impressive array of counsel appeared for the many parties interested in the intervention, including Mr. Ernest Charles, K.C., now Mr. Justice Charles, who led for Mrs. Bamberger. His client's answer to the charges was a denial. She had not, she said, committed adultery with any of the four men or with any other man, and she went further, and said that the marriage with Bamberger had not been consummated and that she was in fact *virgo intacta*. Another prior marriage alleged by the King's Proctor with a man named Jenkins she denied ever to have taken place.

The President delivered his judgement on the sixth day of the hearing. His deep voice was stern as he began by saying that there had been most serious grounds for the intervention. Mrs. Bamberger's evidence at the original hearing of the petition he described as 'nothing less than a simple and deliberate fraud'. The discrepancy between the facts as known to the petitioner and her evidence as given to the Court was as glaring as could possibly be conceived.

After considering the evidence, Sir Henry held the charges proved as regards Symonds and Stein. Having thus found the intervention justified, the President had to consider whether to exercise his discretion in the petitioner's favour despite her conduct. To this end it was necessary to inquire whether Mr. Bamberger had been guilty of 'conduct conducing' to his wife's behaviour.

The President found that the husband had been content to live on the gains of his wife's immoral conduct. That was not to say, however, that he had induced his wife's mode of life. There had been an incident in April 1911, before the marriage with Mr. Bamberger, when the petitioner had been charged with having brought a man named Aguirre home from the Alhambra Theatre and having stolen money from him. That took place when Mrs. Bamberger was her own mistress, and the judge concluded that the subsequent 'levying of contributions' upon men who had put themselves into equivocal relations with the petitioner was the joint act of husband and wife.

The evidence disclosed even graver matters, continued the President. He could not but associate the history of the petitioner since 1911 with the exaction of large sums of money from various people, and one of the letters before the court associated her with the putting of pressure upon the man to whom it was addressed: 'I willingly acquiesced in withholding the name of that person, lest even a trial in a court of justice might be made a mode of odious exaction from persons not concerned in it'.

Sir Henry decided not to exercise his discretion in the petitioner's favour. He said: 'I have listened to this case for six days, and I ask myself whether in any sentence spoken on oath Mrs. Bamberger has dealt honestly or frankly with the court, and I am convinced that she has not. In framing her petition and in the evidence that she gave to the court she drew with deliberation and skill a cloak over the facts. She has shown herself a mistress of the art of fiction and a willing perjurer.'

He rescinded the decree nisi.

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'A willing perjurer!'—Duke's scathing epithet ran round the country from tongue to tongue. People asked each other whether any official action would follow. Perjury was a criminal offence, was it not? The cynical shrugged their shoulders and asked in their turn who had ever heard of a prosecution for perjury in the Divorce Court. Why, you were expected to lie in that tribunal! It was part of a gentleman's code to deny adultery. There would be no proceedings.

A month passed, and the public began to forget Mrs. Bamberger's divorce. Then, on 22 April, her name appeared in the headlines again. The unexpected had happened: she had been arrested and charged with perjury. After appearing at Bow Street she was committed for trial at the Old Bailey.

On 28 June, exactly a week after Swift had become the junior judge of the King's Bench, the senior judge of the same division, Darling J., took his seat to commence the trial. For the Crown appeared the famous prosecutor, Sir Richard Muir, assisted by Mr. Cecil Whiteley, now Common Serjeant of London. For the defence Mr. Cecil Hayes had been retained, a barrister whose forthright advocacy and worldly wisdom had earned him briefs in many of the 'society' cases of this period. The stage was set.

The stage *was* set; but the central character was missing. Mrs. Bamberger failed to surrender to her bail. Instead her counsel applied for postponement, saying that his client was seriously ill with appendicitis; he called a doctor to say that coming to court would endanger her life.

Muir seemed a little sceptical of this application, and Darling took a strong view; he estreated Mrs. Bamberger's bail and issued a warrant for her arrest.

It was five weeks before the warrant was executed. In the interval the defendant had been operated upon for appendicitis, and it was from hospital that the police took her on 2 August to Bow Street, where the prosecution asked for her re-committal to the Old Bailey, and, in view of what had happened in June, opposed bail. But the magistrate viewed the case very differently from Darling. He read her doctor's report and looked at her, pale and ill, assisted in the dock by two nurses. It was a pity, he thought, that she had been arrested so soon. He granted bail.

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The trial began before the new judge on 20 September. Again Sir Richard Muir and Mr. Hayes took their places in

counsel's row. Again the stage was set, and this time the central figure did not disappoint the audience. Mrs. Bamberger was there.

So were numerous other persons. The preceding events, and the piquant nature of the charges, and the mysterious references to unnamed wealthy men, had fanned public interest to an unusual degree. Crowds gathered in the street outside the Old Bailey, while inside the court was packed with privileged spectators, among them being discerned many faces well known in Mayfair and on the stage. The sheriffs had received no fewer than 600 applications for seats. Women preponderated. The case proved fully productive of the sensations that had lured them there.

For it was an amazing story that Sir Richard Muir had to relate. The defendant, he said, was born in 1888, and was the daughter of an Evangelist preacher. She was given the Christian names of Lily Amelia. At the age of eighteen she married a Mr. Jenkins, who two years later divorced her on the ground of infidelity with Mr. Bamberger. Four days after the decree nisi she went through a form of marriage with Bamberger. This was, of course, invalid, and two days after the decree had been made absolute she again married Bamberger, describing herself on this occasion as ' Thelma Dorothy Marchmont, spinster '. She lived with him till 1914, when he joined the army. Soon afterwards she met Symonds and commenced living with him. Symonds knew her as Miss Marchmont.

Sir Richard related the course of the divorce proceedings, and a transcript of Mrs. Bamberger's evidence before the President was read to the jury. He pointed out that she had denied on oath ever having been intimate with Symonds or Stein, or with any one. She had been questioned about three men, referred to as No. 1, No. 2, and No. 3 ; she had said that she had received £5,000 or £6,000 or more from No. 3, about £50 from No. 2, and when it was put that she had received more than £1,000 from No. 1, she said she couldn't remember having had so much. She had had, she said, ' various amounts ' from men while living with Bamberger. ' Do you still suggest,' counsel had asked, ' that no man has had intercourse with you ? '—' I will swear that no man ever has.'

There were eight charges of perjury, Muir told the jury, falling into three groups. She was alleged to have lied when saying she had never misconducted herself with Symonds, to have lied when saying she had not misconducted herself with

Stein and that no man had ever had intercourse with her, and to have lied over the 'Aguirre incident'. When pressed at the intervention with the details of this incident, she had repeatedly replied, 'I don't remember'. The prosecution contended that she remembered very well, but was afraid to confess it.

The Crown's first and most important witness was Symonds himself. He described himself as a designer and decorator, of Bruton Street, W. He met Mrs. Bamberger, he said, in a tube train, towards the end of 1914. 'We smiled at one another, and I then spoke to her.' From 1914 to 1919 they lived together as man and wife at various addresses. Six or seven months after he met her he found out she was married, and she agreed to obtain a divorce. In 1919 he heard of the 'Aguirre incident', but she told him that it was not her, but her twin sister who was there involved.

Mr. Hayes subjected Symonds to a searching cross-examination. The witness was forced to admit that before meeting Mrs. Bamberger he had been on intimate terms with another woman, who had had two children by him.

'Did Mrs. Bamberger pay an allowance to this woman for you?'—'Never a penny.'

'Soon after you met Mrs. Bamberger did you get substantial sums out of her?'—'I never had a penny from her.'

'About three weeks after you met her, did you receive £120 from her?'—'When I met her she suggested to me that she should take a flat. She took it and paid my partner and myself £200 or £300 for the decorations. She said she was getting the money from a very rich uncle.'

'And this is the flat you say you committed misconduct in?'—'Exactly.'

Later counsel suggested that there had been no misconduct.

'I say that is a damned lie!'

Swift suavely intervened: 'You mean the suggestion put to you is inaccurate?'—'Yes, my Lord.'

Hayes: 'I further suggest that you loved her and that she had an intellectual and platonic love for you, while you were keeping this other woman?'—'Absolutely untrue.'

He admitted that when, six months after meeting Mrs. Bamberger, his partnership was dissolved, he received £250 from a friend of hers to set him up in business on his own, but he paid this sum back to Mrs. Bamberger herself in 1917.

A number of witnesses were called to give evidence as to the defendant having stayed at various hotels and elsewhere with Symonds and Stein. The defendant's uncle was called,

to give details of her family history; he had never heard of her having a twin sister. Finally evidence was given that she had been charged at Marylebone police court on 15 April 1911 with stealing £110 from Francois Aguirre. The depositions taken on that occasion were read. The case had gone to London Sessions, where the charge had been withdrawn.

When during the third day the prosecution case came to a close, Mr. Hayes announced that he proposed to call no evidence at all.

This meant that Mrs. Bamberger would not go into the witness-box. It also meant that her counsel would address the jury after, instead of before, Sir Richard Muir. Having 'the last word' is often a considerable advantage to a defence, especially where a hard-hitting advocate is briefed. Of course the true last word rests with the judge; but in the present case the judge was an unknown quantity. He had said little during the trial so far, but his occasional questions had shown that he was missing none of the points made by either side. What his summing-up would be like, none could conjecture.

Muir began his closing address by inviting the jury to say that each of the charges of perjury had been fully proved. He suggested that the perjury had been committed, not so much to procure the President to exercise his discretion in Mrs. Bamberger's favour, but as a vehicle of revenge upon Symonds.

> 'Heaven has no rage like love to hatred turn'd,
> Nor Hell a fury like a woman scorned'—

he cited, and—'who but a woman scorned would in the face of what she knew go into the witness-box at the Divorce Court on a hopeless quest, if it were to get a divorce, but to sow a rich crop of revenge upon the man who she thought had betrayed her to the King's Proctor?'

Muir related Symonds' evidence of his discovery of the Aguirre incident. 'She lied to him,' he boomed in his full, round voice, 'she told him it was a twin sister——'

A scream interrupted him. 'Oh, don't! My God, no!' cried the woman in the dock. She sprang to her feet and collapsed into a wardress's arms.

'I think it will be as well if the court is adjourned now,' observed the judge.

The next morning Sir Richard concluded his speech. He poured scorn on the defendant's allegation of chastity 'after two marriages and all these pretended love affairs with these rich men who were parting with large sums of money for a

consideration which she said she never gave'. He wished that the recently passed Act providing for the serving of women on juries were already in force: would the story of the virgin who had survived these ordeals, the like of which was unknown to history, have imposed on the youngest matron or the eldest maid? He dismissed it as a suggestion not to be believed by anybody out of the nursery.

On that scarifying note he sat down, and Mr. Cecil Hayes rose. His speech had been eagerly awaited, eagerly and with some puzzlement. For what was there to say? The Crown had patiently built up a formidable case: no evidence was called to rebut it; yet the plea of 'not guilty' had not been withdrawn. What line was Hayes going to take? Those who knew him prophesied something startling. They were not mistaken.

He began slowly, carefully choosing his words. 'This case,' he said, 'is one of the most extraordinary and remarkable cases that have ever been brought in a criminal court.

'A new idea has come into the minds of those conducting the criminal administration of England—that perjury in the Divorce Court is a thing that must be punished, and that punishment must be begun.'

He paused. Then his words took on a new urgency as he pointed to his client sobbing in the dock and went on, 'Who has been chosen to make an example—carefully chosen? This little woman! A woman of no consequence, with no friends, with no one to offend—a little bit of delicate china that could be smashed and thrown on the dustheap! She does not matter! She is neither a peeress nor a Cabinet Minister. They can begin to clean their Augean stables with her!'

Counsel had struck his major chord; his speech was to be a bitter and passionate attack upon the prosecution. He spoke on with increasing vehemence and with scarcely a pause, his silver tones enlisting first the attention, then the sympathy, and finally the emotional response of the jury.

He boldly contended that the Crown had not proved its case. This was not a prosecution: it was a persecution! Let them look at the witnesses who had been called—there were others who ought to have been called, but they had been shielded, shielded up to the hilt.

Here Swift stopped him. 'You must confine yourself to comment on the evidence. Had you desired to suggest that someone else should be called you should have done so in cross-examination, or you should have called him yourself. I

cannot and will not allow you to make an attack upon anybody for which there is no foundation in the evidence.'

Unabashed, counsel reiterated that the prosecution should have had the man there. 'Who gave Mrs. Bamberger's little fancy gentleman Symonds the £250 to start his business with? The great Number Three's name must not be mentioned, because he is a rich man!'

Next he turned his vitriolic attack upon the divorce laws. 'In other countries these people might have gone and got their divorce, followed their own separate stars, been happy. Instead of that they are, by the King's Proctor's decree, doomed and damned in this world that they may never marry any one. They must either sin or remain united in misery for ever!'

He was not putting Mrs. Bamberger forward as a woman of virtue: he was saying the prosecution's evidence was absolutely incomplete. The only person they had brought there to prove that she had committed adultery was 'this wretched little person Symonds'. It was Mrs. Bamberger's oath against his. 'I hope you will pay one compliment to that unfortunate and unhappy child by refusing to accept the word of Symonds.' Yesterday Sir Richard had quoted Congreve's couplet about a woman scorned; might he add two lines to it?—

> 'Twas far more vile than anything like that
> To take her cash to decorate their flat.'

Next counsel embarked upon a task which an enthusiastic journalist afterwards described as 'literally tearing the King's Proctor to shreds'. He said that that official was trying to punish Mrs. Bamberger for all the sins committed in fashionable divorces for the last fifty years. This was the only charge of perjury that had arisen out of the 40,000 defended divorce cases since 1873—yet in every defended case in the Divorce Court the loser must have committed perjury! 'I ask you,' cried Hayes, 'to do the right thing, the fair thing, and the clean big thing: to look at this in a broad way and to dismiss these charges which ought never to have been brought!'

Riding on the full tide of his indignation, counsel loosed all his invective upon the prosecution. Their methods he described as terrible, ruthless, diabolical. The Aguirre incident had been 'dragged and dug up from the grave like a ghost and thrown at Mrs. Bamberger'. A gentleman was supposed to deny adultery in the Divorce Court. 'But see how differently the laws treat women and treat men. I am fighting to the end for fair treatment and justice for women.'

Hayes reached his peroration. Dropping his voice, abandoning his gestures, he said steadily: 'I have finished my appeal to you. Her fate is now in your hands. Whatever be your verdict it can only partly relieve the sufferings of one who has suffered not only for her own sins, but for the sins of others. By the cruel decree of the King's Proctor she must now either go forth along the walk of life alone or stray in the paths of sin; her love can only be a thing of shame. Yet we are the guardians of Christian civilization. When they brought unto Him a woman taken in adultery, He said unto them, "He that is without sin among you, let him first cast a stone", and they all left, beginning at the eldest, even unto the last. Then He said unto the woman, "Go, and sin no more".'

* * * * *

It was a remarkable speech, a speech of a type rare nowadays, when sweet reasonableness is regarded as the hallmark of forensic eloquence. Read to-day, it sounds extreme, but that is the fate of impassioned oratory when reduced to the printed page. In the packed Old Bailey court it served its purpose: it had gilded over a sordid case, it had conjured up a defence where none seemed visible, it had filled the sober court-room with the rending emotions of the theatre, and it had, as it were, set up footlights round the dock to display therein a sobbing woman fighting a lonely battle against a vindictive law.

And it had immeasurably increased the difficulty of Swift's task. He turned now in his chair on the dais and, facing the jurors, began the first summing-up of his career as a judge. It was his duty to direct them upon the law applicable to the case, to draw their attention to what the prosecution had set out to prove, and how the defence answered it, and to summarize the evidence given.

He spoke for ninety minutes. His voice seemed quiet after counsel's ardent declamation. He went through the case item by item, and as he proceeded it became evident that, alone perhaps in that crowded court, he had kept his head above the waves of emotionalism with which Hayes had flooded it. His unhurried words seemed to be the voice of reason replying to the voice of emotion, and as he went calmly on the hysteria subsided, the mists of feeling dispersed, the glamour departed from the dock, and the court lost its air of theatre and became once more the arena of impartial justice.

In his opening words he at once displayed himself as the solid realist he was. This case, he said, had aroused the

greatest interest since the previous March; it had been discussed in the Press, in clubs, in trains, wherever men met. 'No doubt,' he remarked dryly, 'it does not lack sensationalism.' The jury had probably heard of it long before they were summoned to the court. Whatever they had heard outside they must exclude from their minds. Nor must they be swayed by the youth, the beauty, or the ill-health of the defendant.

He read to the jury the legal definition of perjury, and continued: 'According to the law of this country it is as much perjury to say that which is false in the Divorce Court as it is to say it in any other court. The laws of this country know no distinction, and it does not matter one bit what people outside this court may have thought yesterday or a hundred years ago, nor does it matter what they are still thinking. You are here to try whether a particular person has committed perjury in the Divorce Court, and it is entirely beside the question whether some forty thousand other people have done the same thing or not.'

As for the King's Proctor, if ever there was a case showing the desirability of having an official to keep an eye upon divorces, it was this case. On the central issue of whether adultery had taken place, he told the jury that they must draw their own conclusions from the evidence that a young man of apparently lustful passions had been living with a beautiful woman, the wife of another man. 'The slightest intelligence of the most innocent human being, who has attained the age of maturity, could come to a conclusion as to what is likely to have taken place.'

The jury retired and returned with a finding of 'guilty' on all the charges. Mrs. Bamberger braced herself to receive sentence. But the last sensation of the sensational trial was still to come. Muir was on his feet again.

He informed the judge that on 28 February, two days before she gave her evidence in the Divorce Court, the defendant in the name of Marchmont had gone through a form of marriage at Gretna Green with a young man aged twenty-six, the son of a wealthy father.

Swift listened silently; then addressing the dock he said, 'Thelma Bamberger, the sentence of the court upon you is that you be imprisoned for nine calendar months'.

Some anticipated another hysterical outburst from the dock, but there was none. The defendant turned and went quietly down the stairs from the dock and away to prison. The great throng outside which had for hours blocked the street to

vehicles stayed long enough to boo her cab as it went by, and then slowly dispersed. The sensation-seekers inside the court had gazed for the last time upon the face whose beauty had led only to degradation, and they too dispersed, in limousines and taxis. One may hope they derived some benefit from what they had seen. Counsel carried their red bags back to the Temple, and the judge went home to Sussex. The great Bamberger trial was over.

It left its legacy behind. It added to Mr. Hayes's already great reputation. It led to a stiffened attitude towards divorce-court perjury, though it by no means put an end to that form of crime; *The Times* editorially considered the conviction to be 'a climax in a defective system', and continued: 'The divorce law is accountable to some extent'. There lay the rub: and the Bamberger case set many people wondering whether the public interest could not be better served by enlarging the grounds for divorce, and so releasing that court from its preoccupation with adultery. Here may be seen the start of one of the rivulets that in time grew together into the tide of public opinion strong enough to force A. P. Herbert's Bill through Parliament. Certainly Swift was of this opinion, and the fact that at the outset of his judicial career he was faced with divorce-court evils in so extreme a form played no small part in forming his strong views upon a branch of the law which, as will be seen, troubled him to the end of his days.

Upon him the case had a more immediate effect. It seated him firmly upon the Bench and in the public estimation as a strong judge. Commendation was heard from all quarters of his firm handling of the trial, of his unruffled good nature, of his disinclination to be stampeded. Typical was the comment of the *Sunday Times*: 'Absolutely imperturbable, and lacking the slightest display of emotion from beginning to end, he was emphatically the judge to try a case where sympathy for a young and good-looking woman, or disgust at a sordid story of a somewhat lurid career, might have disturbed the true balance of justice one way or the other.'

The Temple was equally enthusiastic; a heartfelt, if somewhat backhanded compliment coming from Hayes, who was heard afterwards to say, 'I'd have got her off if it hadn't been for Swift'. Encomiums were not lacking from his elder brethren of the Bench. At a Law Society dinner in Liverpool shortly afterwards, the Master of the Rolls, Lord Sterndale, went out of his way to add his tribute: Mr. Justice Swift, he said, by his trial of a case written up by the newspapers to the level of a great sensation, had given them a fine example of

the dignity and composure proper to the occasion. Swift was present at that dinner, and he was naturally gratified at such a tribute from the man who had first guided his footsteps into the path to London and to success. He said as much when he came to speak. And being among his old Liverpool friends, he observed, ' It seems to have been a bit of a surprise to some of you that I had the slightest idea how a jury case ought to be tried '. (Laughter.) ' But it doesn't surprise me in the least.' (Renewed laughter.) Having learnt advocacy in the Liverpool courts, he added, he would have been surprised had he not known: ' Whatever I am can be summed up in the one word " Liverpool " '.

It was a graceful tribute to the city he loved, the city where the foundations of his career had been so firmly laid. But it was more than a well-turned phrase: when he said he was not surprised, he spoke the literal truth, for he had known in his heart that he would be able to conduct a trial by jury as it should be conducted. Few newly-elevated judges have faced such an ordeal in their first criminal case, none could have acquitted themselves better, and among the reasons for his success was his self-knowledge. That certainty of mind that was his greatest asset was not confined in its scope to outward things. It conferred an inward knowledge too: he knew his own failings, he knew his own qualities.

As he went home to his house by the links at Crowborough, after sentencing Mrs. Bamberger to nine months' imprisonment, Swift must have felt that he had successfully played himself in over an unusually difficult course and to the evident satisfaction of an unusually large gallery.

CHAPTER SEVEN

CRIME AND PUNISHMENT

' I have been an associate of criminals all my life.'

NINE months' imprisonment for perjury! Was it a light sentence, having regard to the fact that the maximum is seven years' penal servitude? Was it a heavy sentence, when one remembers the publicity of the trial and the ignominy of conviction? What sentence would you have imposed?

Swift had faced the problem of punishment for the first time in his judicial career. Soon he was to encounter it again, and in bulk. That autumn he went on Assize to the North-Eastern Circuit, bearing His Majesty's commission of ' general gaol delivery ' charging him to deliver from the gaols of Northumberland, Durham, and Yorkshire all those incarcerated and awaiting trial. There were twenty-eight prisoners in the calendar at York and forty at Durham, and proportionate numbers at Newcastle. Before the Bamberger case the new judge's experience of the trial and sentencing of criminals had been confined to dealing with the occasional housebreaker at his Quarter Sessions at Wigan. Now he was face to face with crime in earnest, the crime engendered in the squalor of the slums of the industrial north-east coast.

He went his circuit with the traditional pomp of Assize. He was attended by the sheriffs and their chaplains; he travelled in the stately conveyances provided for the King's judges; he entered his courts to the fanfare of trumpets; he went in his full-bottomed wig to cathedrals on the Assize Sundays. But it was not long before those whose business lay in the courts of the four northern cities discerned that the central figure in the judicial pageant was a man of outstanding character, and that beneath the scarlet robe and the ermine mantle there dwelt an understanding heart.

His wit, of course, attracted immediate attention. Swift never could suppress his sense of fun. When the Durham jurors craved leave to inspect the prison, he sent them on their way with the earnestly expressed hope that they would get out as easily as they got in. When the Mayor of York mentioned the city's history, he said, ' Mr. Mayor, a city without a past is

as much to be pitied as a woman with one'. But it was no mere jester, the North-Eastern Circuit barristers soon found, that had come among them. Here was a strong judge, a man who believed in order and in method, and woe betide the witness who was late or the spectator who chattered. Above all he attracted attention by his treatment of the men who stood in the dock before him. However wretched the prisoner might be, however revolting his crime, he found himself treated with kindness from the Bench, a kindness moreover that was not as charity dispensed from above, but was made to seem the courtesy accorded to an equal. Nor was this kindness an empty urbanity. Swift saw to it that prisoners received a fair trial and that none should suffer through inability to afford legal advice. If he perceived a flaw in the prosecution case or a possible line of defence for the prisoner, he made sure that the accused should have advantage of it. Time and again he refused to take a plea of 'Guilty' from the man in the dock, telling him instead to plead 'Not guilty', asking one of the counsel in court to defend him, and putting the case back to permit the defence to be elaborated.

Such conduct, however, was easy and natural to a man with so abiding a passion for fairness. What he never found easy was the problem of what to do with these men and women after they had been convicted. So difficult is the problem of punishment that many who have to face it are reduced to rule-of-thumb methods. That was never Swift's way, and from the outset of this Assize it was seen that he treated each case individually and dealt with it with humanity and understanding.

A Wesleyan minister chanced to be in York with time on his hands on one of those November days when the judge was working through the criminal calendar. To pass the time he slipped into court. What he saw caused him to spend the rest of the day there, and what he heard moved him later in the week to sit down and write to the judge.

'I do not know [he wrote] whether it is a customary thing for members of the public to write words of appreciation to His Majesty's judges, and if I take an unusual liberty in so doing, please forgive me. . . . I have felt ever since Monday that I would like to thank your Lordship for the most notable exhibition of impartial justice and of merciful consideration that I have ever known. I am not an emotional man, but more than once I was moved to tears. I have ventured to use your conduct of these cases in several different towns this week as illustrating human justice at its best.

'Allow me as a citizen to thank your Lordship most sin-

cerely, and to express my pride of being a citizen of a kingdom in which even the worst and most unfortunate are treated with the fairness and redemptive mercy which you showed. . . . I shall always rejoice to think of your Lordship as one who is helping to redeem and to uplift the most difficult class of our modern society.'

That letter naturally gratified the judge, and the more so because it showed that he was succeeding in a difficult task, which he had secretly imposed upon himself. A friend of his, bearing in mind that Swift was the youngest judge on the High Court Bench and could look forward to many years in office, asked him at that time whether he had ambitions to become a Lord Justice and sit in the Court of Appeal. Swift answered simply, ' No, never. I want to be the best criminal judge and to be remembered as such. I shall try to be.'

The pains he was prepared to take to fulfil his ambition were well illustrated by an infanticide case he tried on that first Assize. A woman was charged with murdering her three-weeks-old baby. She was shown to have been suffering at the time from puerperal mania, and was found ' guilty but insane '. The medical evidence showed, however, that she was sane by the time of the trial, and the doctor told Swift that if she went to the Criminal Lunatic Asylum at Broadmoor he feared that the environment would affect her mind. Swift sent for the governor of the prison and told him that he must keep the woman in gaol and on no account send her to Broadmoor; he then sat down and wrote a strongly-worded request that the woman be released at once, and sent this by special messenger to the Home Secretary in London. The judge's marshal was despatched to the prison to reassure the woman, and within a few days she was released. (Two years later the Infanticide Act was passed relieving the courts of the necessity of treating these sad cases as murder.)

Incidentally that marshal was Mr. Leo Page, now so well known as a penal reformer. It was as a result of his talks with Swift that, on this Assize, he visited a prison for the first time. ' That Assize was the *causa causans* of my prison interests,' he writes.

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Mercy in Swift's case was soon seen to flow from understanding and not from weakness. One of his first cases on that Assize displayed him as a stern avenger of brutality. In this case two men named Robinson and France were charged with robbery with violence in the Westmorland Road district of Newcastle. They were said to have attacked an innocent

citizen in the street, dragged him into an alley, and kicked him about the face until he became unconscious. They then, according to the prosecution, made off with £3 in money, his watch and chain, two pairs of spectacles, and even his handkerchief. The remarkable feature of the case was the evidence of two prostitutes. One of these said she had been asked by the prisoner France to ' pick up ' the victim and take him round a corner, where France would ' squeeze ' him. She had replied, ' Do your dirty work yourself '. The other woman had also, she said, been asked by France to ' lumber ' the victim so that France could ' knock ' him. She had not known France previously. She had replied, ' I don't get my living that way '. Neither woman had been surprised at such a suggestion having been made. But if they were not surprised, Swift was, and he further questioned them, eliciting the fact that plenty of women in that part of Newcastle acted as decoys in this fashion.

' Is it a common method of earning a livelihood in this part of the town ? '—' Yes.'

The judge went out of his way to comment upon these revelations in his summing-up : ' It is startling to think that in a place like this, which is said to be in the centre of the town, such things can happen. I hope that these facts will go home to those responsible for the preservation of peace and decency and order in the streets of Newcastle.'

The two prisoners were found guilty. Robinson was stated to have a long prison record. ' I am determined that for a time society shall be protected from you,' said Swift, sentencing him to five years' penal servitude. France had hitherto borne a good character ; he was given imprisonment, and—so that ' you shall feel something of the pain you inflicted on your victim '—the cat-o'-nine-tails.

Incidentally this case furnished an instance of the judge's remarkable memory. In 1933, thirteen years afterwards, it was recalled to him by the barrister who had defended France. ' Do you remember, judge,' he said, ' giving him—what was it ? —twelve months and thirty-six strokes ? '

' No,' was the instant rejoinder, ' it was nine months and twenty-four strokes.'

The barrister went home and looked it up : the judge was right.

The promise of that first Assize was fulfilled. Swift became a great criminal judge. During the seventeen years he was destined to sit upon the Bench, he tried many thousands of offenders, from quavering boys who had erred for the first time to notorious criminals, some of whose trials figure in this

book. He conducted these cases with his wonted fairness, and he sentenced convicted persons, whenever he possibly could, with lenity. He always generously exercised his discretion to allow free defence under the Poor Prisoners' Defence Acts; indeed, his view was that these statutes were not liberal enough. He once said, 'I think that no person prosecuted by the Crown should be without counsel to defend him if he desires legal aid'. Only one criticism can perhaps be levelled against his criminal trials, and that is that, being a man who had no doubt of his own mind, he could not conceal his own views when summing-up, and if his view was that a prisoner was guilty, his addresses to the jury sometimes therefore bore an appearance adverse to the accused. This is of course a common fault with strong judges, and perhaps because he realized it, he invariably included a reminder to the jury that the verdict was theirs and not his, and that they, and they alone, should decide upon the facts.

The secret of his success as a red judge was his insight into the human soul. He knew the pitfalls that beset the path of mankind through life; he knew how ill equipped many—nay, most—of us are to withstand temptation if the temptation be strong enough; he knew the frailties of the human will and the inherent goodness of the human heart. There is an old piece of doggerel that epitomizes much of his outlook:—

> 'There is so much good in the worst of us,
> And so much bad in the best of us,
> That it ill behoves any one of us
> To find any fault with the rest of us.'

Whether the judge was acquainted with that verse or not I do not know, but it would have pleased him, not so much because he had a fondness for doggerel and frequently inscribed bad verses of his own composition in autograph albums and visitors' books, but because it reflected his own views. 'Everybody is honest and dishonest in patches. No one is completely dishonest, and very few people are completely honest.' Those words, spoken from the Bench in 1929, caused shudders among the pharisaical, who deplored them as an illustration of the warping effect of a decade spent trying crime. It was nothing of the sort: the reader will remember how fifteen years before, when he took his seat as Recorder of Wigan, he had used much the same language in referring to the naughtiness in all of us and the good spark in all of us. 'I have been an associate of criminals all my life,' he said in 1930. 'I have defended them, prosecuted them, and for years have tried them. I know there is a very great deal of good in the very worst of them.'

A man who considered himself without a failing could not have referred with sincerity to the naughtiness in all of us. Part of the secret of his insight and humanity was the fact that he himself was, and knew himself to be, as human and as fallible as any other. He was not a man who had never felt temptation. He was not even a man who had never yielded to temptation. As one of his marshals writes, 'There was a tremendous humanity about him that should be the big inscription on his monument. And just because he was human he had the faults of humanity.' It was the triumph of his kindly character to transmute what faults he had into instruments of good. Precisely because he knew his own weaknesses, he could evaluate and discount the weaknesses of others. Humility is not a quality that one would ordinarily associate with Swift, but in his dealings with convicted criminals there can, I think, be detected a true humility born of a compassionate understanding of the dark places of the human soul.

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He hated prisons: 'I spend the greater part of my time on the Bench not deciding for how long I should send a man to prison, but whether I can possibly avoid sending people to prison, particularly for the first time'. For this reason he was a staunch upholder of the probation system. And the same reason caused him to utter an extempore speech at the London Guildhall in 1931 which was widely commented upon and helped to bring about an alteration of the law. He was told that in the previous year 2,419 people were imprisoned in Brixton Prison for debt. 'Shades of Charles Dickens!' he exclaimed. 'I am shocked. I thought that had gone years ago. Either my preconceived notions were misconceived, or else a great many people are imprisoned whom the law never intended should be.'

If he hated prison, when it could be avoided, for the guilty, how much more would he hate prison for the innocent! In 1924 he made his first peregrination round the South-Eastern Circuit, and caused no little heart-burning among the Benches of the Home Counties by his outspoken denunciation of the local justices' attitude to bail. At Maidstone there appeared before him in the dock a man who pleaded guilty to forging two cheques, one for £1 13*s.* 5*d.* and the other for £2 14*s.* 6*d.* When committed for trial by the magistrates he had been granted bail in one surety of £50. He had been unable to find a surety. 'For three months and more, therefore, this man has been kept in gaol, not because there was any fear of his

not turning up at the Assizes, but because he had not a friend who was prepared to become bail in £50. It is a very improper and a very disgraceful thing.' The prisoner was discharged. At Guildford, the next town, he found that a woman had been in custody for four months 'upon an offence for which I would only have sentenced her to one day's imprisonment'. The offence was bigamy. He added, 'Magistrates have no right to keep people in custody like this'. At the next town, Lewes, he carried the war into the enemy's camp by admonishing the Grand Jury (composed of magistrates) upon the subject. Out of thirty persons committed to that Assizes only twelve had been admitted to bail. Another similar case elsewhere led to the caustic observation: 'Even the criminal law has to be administered with some consideration for humanity'.

The Justices of the Peace of Kent, Surrey, and Sussex were not a little displeased with this presumptuous and forthright Northerner who did not take the trouble to wrap up his words when he found matter for criticism. The chairman of the Kingston County Bench made a public statement in court on behalf of all the Surrey chairmen of magistrates. They had nothing to reproach themselves with, he said, and they all resented the judge's general allegations.

However that may be, it was noteworthy that the bail situation improved after that circuit, and only once again did he find it necessary to speak out. This was at Bristol in 1935, when he found that a man had been imprisoned in default of a £10 surety. 'I thought this kind of thing had stopped,' he exclaimed. 'I protested against it ten years ago, and I have not seen anything like it for a long time.'

People sometimes said that Swift's lenience was sentimentality. Such a suggestion roused him to indignation: 'Let nobody think there is maudlin sentimentality surrounding the criminal to-day. There is no false sentiment in the proper treatment of first offenders.' When he felt that mercy would be wasted, he could be as stern as his brother Avory. He believed in the wholesome deterrence of flogging—'A man who has once been flogged for robbery with violence very rarely repeats the offence', he once said. These pages will afford instances of his bestowal of long sentences of penal servitude where he thought them deserved: seven years for Francis Lorang, for instance, and fifteen years for the Westwood crime. Crimes against children enraged him, and he hated cruelty with all his might. The only punishment of his that was thought severe on his first Assize was one of ten years' penal servitude given a man of previous good character who had stabbed another with a knife in a

drunken brawl in a public-house. It was the use of the knife that earned the long sentence.

He was no opponent of the death-sentence for murder, though, like all his fellow-judges, he disliked the task of imposing it. It was an unwelcome duty, but because it was a duty, he discharged it without displaying the emotion sometimes affecting judges when the black cap has been placed upon their heads. (One recalls the painful scene when the late Mr. Justice Bucknill sentenced Seddon, the poisoner.) An official once had the temerity to ask Swift, just after he had pronounced this sentence, what it felt like to condemn a man to death. He received this reply: 'Sir, I have had to carry out a dreadful duty, and I am astonished that you can think it can have had any effect upon me save that it has moved me to great unhappiness'.

But he would have preferred that this chapter should dwell not upon the times when his duty compelled him to be hard, but upon the occasions when he saved some sinner's self-respect by treating him as a man of honour. He would gladly acknowledge, if he were asked, that he owed the lesson that a judge's duty was to reclaim as well as to punish to the example of Charles Hopwood, the Recorder of Liverpool before whom he practised in his early days at the Bar. Hopwood was the pioneer of light sentences. For a first offence of larceny he would give three months instead of the customary seven years. Such conduct shocked contemporary Liverpool, and the city magistrates boycotted the sessions, sending their criminals for trial instead at the Assizes, where they would get good long sentences from good old-fashioned judges. Hopwood was a man before his time, a voice crying not so much in the wilderness as among the deaf. Some few there were, however, who opened their ears to his message, and after his death his doctrines began to infect one after another the occupants of the King's Bench. Of the few who heard with understanding ears, the impressionable young barrister, Rigby Philip Swift, was one, and he took occasion in his first public speech in Liverpool after he was made a judge to acknowledge his debt to the humane Recorder: 'Like every prophet, Hopwood had no honour in his own country and among his own people, but he started a system of punishment which has permeated throughout the whole British Bench'.

Many instances could be recounted of the mercy that so impressed the Wesleyan minister in November 1920. A boy of nineteen was charged at Maidstone in 1929 with abducting a girl of fifteen. For this the maximum sentence is two years'

imprisonment. Swift said, 'I think it is obviously the best thing for both these young people to get married as soon as they can'. Turning to the prisoner, he added, 'You may go'. In the same year he had before him at the Old Bailey a woman found guilty of the manslaughter of her husband. For that she could have been sent to penal servitude for life. She and her husband had quarrelled over the cooking of some winkles; her husband had struck her and she had fallen over a plate-rack, breaking its contents; she had picked up a piece of broken plate and thrown it at him, mortally wounding him.

Swift gave her four days' imprisonment, which meant her immediate release.

At Winchester Assizes in 1931 a young man aged twenty-one came before him charged with the crime of sexual intercourse with a girl aged fifteen. The maximum imprisonment for this is two years. It appeared that the pair had been to a register office, where they found the girl was too young to be married. A child had been born. Addressing prosecution counsel, the judge said:—

'Can you understand why a girl can be old enough to be a mother and cannot be old enough to be married? Isn't it very curious that a girl below the age of sixteen who has given birth to a child cannot get married however anxious the parties may be to get married, and however the parents may desire it? The obvious result is that they will not get married, and the child will be illegitimate. These two people might have been happy together, whereas this wretched man may have to go to gaol. I do not know if those who made the law will tell me how long I ought to send him to prison for. The trouble is they never consider these cases.'

The young man was found guilty. Swift discharged him.

The humane judge had his reward in the letters that prisoners wrote to him. 'I was tried by you at the —— Assizes in 1928 for conspiracy, bribery, and corruption. You, my Lord, bound me over. I now thank you from the bottom of my heart for the chance you gave me. . . . I have been in constant work since 1929. My wife joins me in thanking you, and I will still continue to do my best.' That was no impulsive letter, written on the flood tide of relief at escaping prison, for it was written in 1936; a letter like that after eight years meant that a man who had once strayed from the path of rectitude had become an upright and useful citizen. What would he have become if he had received a prison term?

Letters of this sort justify Hopwood the prophet without honour and Swift his disciple. Another man, bound over in

London in 1934, wrote fervently, ' I am determined, come what may, I will starve if need be, I shall *not* let you down '. A binding over in the case of a bad sexual crime in a country district brought a letter two years later from the parish priest. ' Your venture of trust has been successful. . . . As an old clergyman, will you allow me to say without presumption how much I admired your treatment of this difficult case.' Some of these letters were scrawled in illiterate hands on coarse prison notepaper: they were written by men given perhaps half the sentence they anticipated. Said one, ' I am sending you this letter to inform you that I do not no [*sic*] how much to thank you for your kindness in giving me another chance in life, and I hope when my time is up that I will make good of it. I hope that you will live long and happy.'

Happy the humane judge certainly was when he received messages like these. He kept such letters and treasured them, and they were found after his death in his room at the Law Courts, stored together with notes from Lord Chancellors and official communications from high dignitaries of State.

CHAPTER EIGHT

THE SINN-FEIN CASE

'If the evidence before you satisfies your consciences that the men are guilty, you must not hesitate to find them guilty; if it does not satisfy you, you must not be afraid to say not guilty.'

DURING legal vacations one High Court judge must be available in or near London for the transaction of urgent business, and when thus serving his turn as vacation judge in October 1921, Swift had one of those experiences that will long be remembered by collectors of legal curiosities: just as Lord Brampton is recalled as the judge who granted an injunction on Brighton pier and Vice-Chancellor Shadwell as the judge who heard a vacation case when bathing in the Thames at Barnes, so Swift will have his niche as the judge who held court in a railway-carriage. On 5 October he had just taken his seat in a train at Cannon Street station, en route for Crowborough, when a barrister arrived flourishing a brief. While the guard waited, whistle in hand, Swift heard his application and granted an interim injunction.

The judge had been on Assize almost continuously since his first visit in the previous autumn to the North-Eastern Circuit. He had gone the South Wales Circuit in the winter, and his own old circuit, the Northern, in the spring. At the end of May he had returned again to the Northern to take the Summer Assizes, and there at Manchester he had found awaiting him the second outstanding criminal trial of his judicial career, the trial of nineteen Irishmen charged with treason-felony.

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The twelve months following Swift's appointment formed Ireland's year of tribulation. The winter nights of 1920–21 were illumined with the flares of burning farmhouses, marking the advance through the distressed countryside of the illegal conspiracy called Sinn Fein. It was the time of the Irish Republican Army and of the Black-and-Tans, of ambush and reprisal, of gunmen, plotters, and spies, of terror, arson, and murder.

The Sinn Feiners sought to carry their campaign of violence

against the British Government into England itself, and English towns with an Irish population became infected with something of the insecurity prevailing across St. George's Channel. Manchester was one of those towns, and there were Irish-gunmen shootings in Manchester that winter, and there was a whole series of fires puzzling to the police at first, but rendered intelligible when documents were captured in Ireland in a raid on the I.R.A. headquarters showing that Manchester had been chosen as a ' reprisals centre '. There were forty incendiary fires in and around the city between November and April, including the destruction of the stands at the Manchester City football ground, the series culminating in the early hours of 2 April, when the Victoria, Albion, and Blackfriars hotels were set on fire, together with a café and several warehouses. By that date, however, the police had perfected their plans, and on the same evening a raid was made upon an Irish club in Erskine Street, Hulme. Knowing their men, the constables went armed, and the raid turned into a revolver battle in which one ' Morgan the gunman ' was shot dead, another Irishman was seriously wounded, and a policeman had a bullet pass through his cheek.

For complicity in these events nineteen Sinn Feiners were committed to the next Assizes accused of ' compassing and intending to depose the King ' and ' compassing and intending to levy war against the King '. These charges amounted to treason, for which the penalty is death, but, by a unique provision of the law, they also amount to a lesser offence called treason-felony, for which the punishment is within the trial judge's discretion, subject to a maximum penalty of penal servitude for life. This hermaphrodite crime was called into being by the Treason Felony Act, passed after the Irish agitation of 1848, owing to the difficulty of inducing juries to convict rebellious Irishmen of a capital crime.

It was not the gravity of the charges alone that was to render this so important a trial. Charges of treason and treason-felony are among the rarest of entries in the criminal calendar in these settled times, but going beyond this in importance to the State was the fact that this was the first time in England that membership of Sinn Fein was charged as being an offence in itself. Hitherto Sinn Feiners had been tried for whatever overt crime they had committed, whether it was murder or assault or arson ; but now the Crown was going farther, and contending that mere membership of this association or conspiracy of itself was one of the most heinous crimes known to the law.

The importance attached by the Government to the trial

was seen in their sending the Attorney-General (Sir Gordon Hewart, K.C.) to Manchester to lead the prosecution. The trial, destined to last six days, began on the Thursday of a week memorable in Irish history. Fundamental changes had been going on since the prisoners' arrest; the King had made his famous appeal for peace at Belfast, and the British Government which had up to April been talking grimly of 'hunting down the murder gang', had in June suddenly exchanged the mailed fist for the olive-branch and invited the leader of the same gang, Eamon de Valera, to London. On Monday, 4 July, a preliminary peace conference opened in Dublin. On the 8th General Sir Neville Macready, the Commander-in-Chief of the British forces in Ireland, walked unarmed to the Dublin Mansion House to meet the republican leaders. On the previous day Swift's treason-felony trial had commenced.

Though hope might be dawning in Ireland, the Manchester officials dared not relax the stringent precautions they had taken to prevent the trial being made the occasion of some spectacular outrage. The general public were not allowed in the court, and it was only after representations by defence counsel that the prisoners' friends were admitted, and they were relegated to the gallery. The great crowd outside were kept moving, revolvers were issued to the police on duty at the court, and an armed escort accompanied Swift's carriage. This last attention was extremely irksome to the judge, and one morning he played truant from the official procession and walked down from the lodgings at Higher Broughton to the court at Strangeways. All went well until he arrived at the building, when he was challenged and refused admission. Fortunately a police officer came up at that moment who recognized him, so that he was able to penetrate the guards without delay.

The Crown carefully built up a panorama of the prisoners' treasonable activities. First they painted the background, bringing over witnesses from Ireland under guard and affording them the protection of anonymity in the witness-box. Then the Manchester outrages were detailed, the secret meetings, the stores of explosives discovered, the large-scale attempt at arson, and the battle in the Erskine Street club.

There were some breathless moments in the case. An explosives expert was called to the witness-box and handed a package found by the police. 'The contents are sufficient to blow up this building,' he stated calmly. Then the officer who shot Morgan the gunman was questioned by a prisoner about his quickness on the draw, and in the airless court the spectators sat enthralled while the battle scene was re-enacted.

'Hands up!' cried the prisoner in the dock, and the constable drew his gun and levelled it—instantaneously, it seemed to those watching. Most exciting of all was the sudden scene as the clock struck noon on the Monday, the fourth day of the trial. On the previous Saturday the Dublin negotiations had resulted in a truce being arranged, to come into force at midday on Monday. When that hour chimed, counsel and witness were suddenly interrupted by a cry from the dock. ''Shun!' barked one of the prisoners, a 'captain' of the I.R.A. The others leapt to their feet and stood to attention. Not a few hearts in that court missed a beat as the thought stabbed across the mind—was this the signal for some desperate outrage? But before judge, counsel, or police could take any step, the 'captain' commanded '*Suide sios*' (sit down), and the prisoners resumed their seats. It was their gesture to mark the coming of the truce.

Defending counsel put up a doughty fight on the question whether the complicity of this or that prisoner had been proved, but more than one of the prisoners themselves appeared to regard such defences with scorn; they were, they felt, soldiers of Ireland, fighting for their country, and having fallen into enemy hands, they ought to be treated as prisoners of war. Asked whether he had a statement to make, one of them declaimed, 'I felt I was morally bound to help my country to regain her freedom. The events of the past few weeks have completely justified my contention. The armistice entered into between Mr. Michael Collins, Commander-in-chief of the Irish Republican Army, and General Macready, is a tacit admission that a state of war existed in that country up to 11 July. I understand that this court has no power to treat me as a prisoner of war, but I am bound to take this opportunity of protesting against the indignity and humiliation I will be subjected to in being compelled to wear convict uniform and to associate with criminals of the worst kind if I am found guilty.' Mr. Holman Gregory, K.C., who defended certain of the prisoners, also departed from law to politics in his speech, suggesting that this time of truce was a particularly ill-chosen moment for such a prosecution, and inquiring why Carson, as guilty in 1914 as any of these prisoners now, had not been charged.

Sir Gordon Hewart in his final speech repelled the accusation that the Government were content to negotiate with the Sinn Fein leaders in Dublin while persecuting the rag, tag, and bobtail in Manchester. 'The Irish truce is a truce of murder, a truce of killing, a truce of crime. It is one thing to

suspend crime, another to suspend the criminal law.' The Dublin events were quite irrelevant to the trial, and should be dismissed from the jury's mind.

Here he had the judge with him, for if there was one thing Swift disliked, it was the importation of extraneous matters into a trial. The court was concerned with facts, only facts, and nothing but facts; the question here was whether some or all of the prisoners were guilty of the charges levied against them—and whether the prosecution were wise or not or timely or not, or whether other persons had at some time done the same and gone free, were matters having no more bearing upon the issue than the alleged 40,000 unpunished divorce perjuries had upon Mrs. Bamberger's guilt or innocence. None of his senior colleagues knew better than this judge of twelve months' standing how to cut away from a case the irrelevancies sought to be set up when facts were wanting. He had been a master of this process as counsel, and he had taken his mastery on to the Bench with him, and his summing up in this case left the jury with no doubt of the requirements placed upon them by the oath they had taken.

All but three of the prisoners were found guilty. Addressing the three principal offenders Swift said, 'You will go to penal servitude for fifteen years'.

Uproar immediately broke loose in court. The 'captain' of the I.R.A. was heard to shout, 'As soldiers of the Irish Republic, I ask that we shall be treated as prisoners of war. Failing this, if I am not delivered within twelve months, I shall be a dead man!' The gallery cheered, there were cries of 'Up the rebels!', someone started *The Soldier's Song*, women screamed. . . .

After the gallery had, with some difficulty, been cleared, Swift announced the remaining sentences. One prisoner was given ten years, four were given seven years, seven five years, and one three years.

Fifteen years was the longest sentence of penal servitude that Swift ever inflicted. It was a striking reminder that treason was—treason.[1]

Swift's address contained one useful suggestion that seems to have fallen upon deaf ears, the first of his many *ex cathedra* utterances advocating reform where he considered the machinery of the law needed adjustment or repair. With treason and treason-felony, as with murder cases, the jury may not go home till their task is done, and he said, 'I suggest that there should be an alteration whereby even in cases of murder and treason-

[1] The prisoners were in fact released in the amnesty following the Irish Treaty.

felony it should be left to the discretion of the presiding judge to say whether or not a jury should be allowed to separate. I hope my remarks, made in the presence of the Attorney-General, will be conveyed to the proper quarter, and that in future juries will not have to spend their nights as well as their days in performing their duties.'

One of the three women jurors afterwards said, 'The judge was exceptionally kind, and seemed to be sorry for us. He asked us if we were quite happy. Also he signed one of the women's autograph books on the Bench.'

* * * * *

The Sinn-Fein case, so calmly and carefully presided over, set the seal upon Swift's reputation as a judge. It was a year now since he had been elevated to the Bench, and the legal profession had had time to appraise his qualities. He had for twelve months performed his duty before the most critical audience in the land, and he had performed it to their satisfaction. He had already made his mark as a criminal judge, and by now lawyers were beginning to forecast for him a reputation as one of the foremost trial judges of the twentieth century.

An unusual tribute was paid by Judge Challoner Dowdall when he first took his seat in the County Court at Swift's birthplace, St. Helens. It was his ambition, he said, to follow the example of Mr. Justice Swift, of whom it had been said that he never said an unkind word and never said an unwise word: if a judge could do that, he should be satisfied. Some time later the *Law Journal* devoted an article to Swift, classifying him as one of the 'virile masculine and vigorous spirits in whom a strong character united to consummate common sense and a solid but forcible intelligence are the dominating features'. Active, strenuous, rapid, and downright were some of the epithets employed by the writer, who termed the judge 'the most good-natured and kind-hearted of successful lawyers'. He was also compared with those famous Chief Justices, Lord Ellenborough and Lord Russell of Killowen. An army officer who watched him preside in 1925 over the Communist trial said, 'He looks at one through and through, just as Kitchener used to do when he was Sirdar; it needs a bold man to withstand his glance'.

A different viewpoint is furnished by the recollections of a newspaper reporter who was detailed to report the Kent Assizes on the first occasion on which Swift went the South-Eastern Circuit. The judge's personality, he found, made a long week's work seem brief. He writes: 'He was most charming to every one, judiciously if judicially just, disarmingly and some-

what knowingly humorous, mildly critical of small things—such as the inefficient way of some solicitors in preparing depositions, or anything tending to waste the court's time—but withal a gracious host at the legal table. . . . One other memory: not every judge spoke so clearly as Mr. Justice Swift.'

That last sentiment will be echoed with feeling by every one who has ever had to take down a judge's oral judgement.

Over and above all the other characteristics with which Swift embellished his tenure of the Bench, and heightening them and enforcing them, was his strength, his judicial strength. The Bar knew by now, by the summer of 1921, that no one but Swift could dominate Swift's court. He was in control. To counsel who deferentially murmured, 'Your Lordship is always right', he once flashed back, 'I may not always be right, but what I say here, goes!' To enforce his supremacy he developed his habit of giving three taps on the desk with his pencil as warning that he was about to intervene. At those clear, sharp taps counsel had perforce to cease their orations and witnesses their protestations. Incisively the raps called for silence, and in the silence Swift, in his clear and characteristic tones, would make his pronouncement.

Counsel found it best not to argue after these pronouncements. In one of the trials treated in this volume, defending counsel was about to put some newspaper report to a police witness. 'I will read it in a moment,' he said.

Tap—tap—tap.

'I'm not sure that you will, Mr——.'

'It is only a very short paragraph.'

'The fact that it is short will not tempt me to allow it to be read if it is irregular and improper.'

The paragraph was not put.

The pencil would always be wielded if any kind of recrimination or 'breeze' occurred between counsel. On one such occasion: *tap—tap—tap*, 'I very much object to these passages between counsel, and I will not have them!'

Counsel: 'I am sorry. I forgot.'

'You forgot I was here. Don't do that again.'

To answer the judge back on occasions when he was preserving his authority was to precipitate an avalanche. He loved the apt retort or the swift repartee in the ordinary course, but at these times he regarded a retort as impertinence. In a breach-of-promise case in 1934 an experienced barrister was led to reprimand a witness by saying, 'Don't tell lies to the jury!'

Tap—tap—tap.

'Mr. ——, that is not a proper observation to make.'

'Then I withdraw it.'

'You should never have made it. It is preposterous for counsel to tell a witness not to tell lies. Most irregular and most improper. I hope I shall never hear it again.'

'I do not make observations without foundation.'

Swift, in a terrifying voice: 'That makes it worse. If you say anything more I shall tell you to sit down. I rebuke you for your conduct.'

That incident had a characteristic sequel. At the end of the day counsel apologized, whereat the judge answered, 'Never mind, I said all I thought to be necessary, and you and I have now forgotten the incident. We both know it won't occur again.'

One thing that particularly annoyed the judge as an interference with his authority was the releasing of a witness by counsel. In another trial he wanted a medical witness recalled upon some point. He was not in court. Why was he not in court?

Counsel: 'I must take the responsibility. The doctor said he had to do his round, and I told him his presence would not be needed again.'

Swift: 'Mr. ——, some day you will sit where I am, and then you will make these orders. Until you do, do not make them. Once a witness goes into the witness-box he becomes a witness of the court.'

(Incidentally that reproof contained one of those prophecies of advancement at which Swift was especially skilled; the barrister became a colleague of Swift's upon the Bench a few years later.)

Another eminent K.C., who had done the same thing, evoked a happy shaft of judicial wit when he apologized and added, 'To err is human'.

Quick as a flash Swift retorted, 'But who am I to forgive?'

The judge did not put off his authority with his robes. One night within two years of his appointment he was entertaining the Bar to dinner at the lodgings in a certain town. The senior guest was an eminent and somewhat vain silk who, while they were colleagues at the Bar, had been much senior to Swift. This K.C. commenced to tell some tale of 'a case I won'. The judge turned on him in anger, saying, 'Mr. ——, you will kindly not say at my table that counsel win cases. It is an affront to the judges, who decide cases upon the facts, and not upon the merits of those who appear as counsel!'

Swift could be as firm with witnesses as with counsel when

he felt it necessary. ' To the equivocal witness he was a terror, and in many a case two or three questions put from the Bench at the end of a cross-examination had devastating effect in disentangling the true from the false. Even as a judge he did not let his gifts of cross-examination lie dormant.'

If the Bar and witnesses felt the force of his dominance, those sitting in the jury-box felt it even more. He had the same almost uncanny hold over juries as he had at the Bar, and for the same reason ; never setting himself up to be anything but a plain man himself, he knew what went on in the mind of the plain man on the jury, and because he could follow its workings, he knew what material to provide it with if he desired it to act in a given way. Some justices are content to leave decisions of fact solely to the jury. That was not Swift's way ; he always made up his own mind about a case, and was never satisfied to leave it to the twelve jurors, indifferent which way they found. It was usually observed that their decision coincided with his opinion. That is not to say that he imposed his will upon them at the expense of propriety : time and again his summings-up were tested by appeal, and it was rare for an advocate to be able to point out any material flaw in the Appeal Court. It was that facility of his for picking his way through facts—the gift that had won him his practice at the Bar—that was responsible. Very early in his career an old criminal barrister was heard to growl, apropos of another judge who shall be nameless, ' If I had my way I'd sentence him to a fortnight's detention at the Old Bailey to listen to Rigby Swift summing up, so that he could learn how to do it '. And that non-legal minds were similarly impressed can be seen in another comment of the same reporter who was mentioned a few pages back : ' I thought his summings up were marvels of clarity both from the point of view of delivery and of handling the case, and he never seemed to leave any doubt as to which direction the verdict should go '. A well-known K.C. says, ' Swift was the greatest summarizer of facts of modern times ', and his summings-up still have the reputation in legal circles of being models of their kind. For their directness, for their scrupulous elimination of all irrelevant matter, and, above all, for their gathering together of complex facts and their simplifying of juries' tasks, they were, and are, rightly famed. Space forbids the printing of any of them in their entirety in this book, but it is hoped that the extracts given hereafter are sufficient to enable the reader to appreciate the justness of this reputation. Perhaps it is invidious to pick and choose among them, but of all of them none was more admired than that in the

Revelstoke breach-of-promise case. It may now be convenient therefore to depart from the chronological plan of this biography in order to collect together in one chapter the well-known breach cases which from time to time carried Swift's name into prominence in the newspapers.

CHAPTER NINE

BREACH OF PROMISE OF MARRIAGE

' Very few people in this world who become engaged to be married do come up to the expectations that the other party has formed.'

IT cannot, I think, be said of Swift that he invited newspaper popularity. His forthright habit, however, of speaking what was in his mind made him good ' copy ' for reporters, and from time to time he found his utterances from the Bench blazoned throughout the Press of the kingdom. Though he did not court such publicity, it would be creating a false impression to imply that he disliked it: he made no attempt to conceal a very human pleasure in finding—as he frequently did—that his judicial dicta had become the subject of comment in the editorial and correspondence columns of the Press. With the representatives of the fourth estate in court he was always on good terms. His clarity of diction greatly facilitated their task, and he in turn appreciated their readiness to follow his wishes. When he had been moved to say something—a reproof to counsel, for instance—which he felt might do harm if reported he would tap with his pencil, look towards the Press box, and shake his head. They always took the hint. But they kept their pencils sharpened, for in Swift's court one never knew when the next *bon mot* was coming.

One of the greatest blazes of Fleet Street's pyrotechnics was occasioned early in his occupancy of the Bench by his summing-up to the jury in the breach of promise of marriage case of *Betteridge* v. *Rhodes*, tried in April 1923.

There was nothing out of the ordinary about the facts put forward by the plaintiff in this case, and those who heard it felt that here was the old, old story of a man who proposed marriage and after fixing the date of the wedding felt indisposed to continue with the proceedings. But when the defence was opened, the bystanders pricked up their ears, for it was a defence of an unusual, even a remarkable nature. Mr. Rhodes, the defendant, admitted that he had broken the engagement, but boldly claimed to be justified in so doing by his fiancée's bad temper. She had, he said, been to his home and there

used violent and insulting language to his mother and himself. This was denied by the plaintiff.

The proposition that bad temper justified breaking a solemn legal contract angered Swift. It wouldn't do, he told the jury: the law of England required that before a defendant could justify the breaking of an engagement to marry a plaintiff he must satisfy them that the woman he was refusing to marry was unfit for matrimony generally, by reason of her character and temperament, and not merely unfit to be the wife of the individual defendant. The mere fact that a woman had a temper did not render her unfit for matrimony—or else half the population of the world would never have been born. 'No doubt, members of the jury, you know what it is to have courted an angel and found out after marriage that she was a mere human woman like the rest.'

Several jurors plainly evinced embarrassment at this thrust, but Swift went on, 'Very few people in this world who become engaged to be married do come up to the expectations that the other party has formed. Love is proverbially blind.'

In conclusion he pointed out that the jury had nothing to do 'with those curious people who believe that actions for breach of promise of marriage should be abolished'.

Those few homely sentences carried the judge's name before a wider public than had ever heard of him before. Up and down the country they were reprinted, and even abroad they were echoed from paper to paper. Comment ran the gamut from the *Daily Chronicle's* 'He has seen into the deeper mysteries of love and women and the nature of the marriage contract', to the 'sheer nonsense' of Mr. (now Sir) Max Pemberton, writing in the *Sunday Pictorial*. One New York paper printed the observations under the caption, 'This British Judge Probably has had his Own Troubles at Home'. (He hadn't, of course.)

Many observers concluded that the reference to 'those curious people' was a direct tilt at Mr. Justice McCardie, who had a short time before roundly condemned breach-of-promise actions, and the *Daily Dispatch* doubted whether so deliberate a taunt had ever been made by one member of the Bench against another.

No one who knew Swift would subscribe to the view that he was guilty of a deliberate taunt of a colleague. But he could not have failed to take cognizance of the controversy that has for so long raged round the question whether these actions should be abolished, and he had no hesitation in letting the world know in which camp he stood. His was the legal camp,

holding the opinion that a contract was a contract, and that if a contract was broken, damages must be awarded. But it was not because this was the law that Swift upheld it, for he never scrupled to attack the law if he felt it were working injustice; rather was it his innate fund of human sympathy and his old-fashioned attitude to family life that were responsible. If people said to him that a broken engagement were better than a broken marriage, or that an engagement should be a probationary period, he would retort that custom already provided an ample probationary period, that of 'walking out', and that this was sufficient for people to find out whether they cared for one another so much as to wish to marry. But though he thus upheld breach-of-promise actions, he never encouraged large damages, and was always at pains to present these cases to juries as being on all fours with any other civil action. For instance, he told a Manchester jury in 1928 that an engagement to marry must be fufilled like any business contract: 'The law regards the breaking of a contract to marry as it would the breaking of a contract to sell flour, and whichever party breaks off the contract becomes liable to pay damages to the other party'. This utterance brought down upon his head the wrath of the *Liverpool Echo*, which said: 'The majority of actions for breach of promise of marriage are sordid, contemptible, and vindictive. The fact that the female plaintiff has escaped an unhappy marriage is overlooked, and instead of repining, she ought to rejoice. Those who look upon engagements to marriage as similar to selling sacks of flour will naturally favour actions for breach of promise; but for those who have higher ideals such actions, with few exceptions, will be regarded with contempt.'

The jury in *Bettridge* v. *Rhodes* had awarded £50 damages. They awarded five times that sum in another case, at Bristol Assizes, where the grounds alleged by the backsliding male for his defection were far more slender. This gentleman discovered, to his horror, that his lady used lipstick and rouge, and reprimanded her sharply. She slapped his face and threw the engagement ring into the fire. Swift's comment was that if the use of lipstick or powder was to be a ground for breaking off an engagement, the institution of marriage would be seriously menaced.

Breach damages were never large when Swift tried the case, a fact attributable to his sense of humour. This was continually cropping out, dispelling like the sun's rays the mists of emotion and indignation that counsel sought to conjure around the jury box. Thus at Swansea Assizes in November 1936 he

had before him a case in which a boarding-house keeper was suing one of her former lodgers. He was alleged to have proposed to her, but to have broken off the engagement through the fascination of another woman. Plaintiff's counsel was putting this to his witness when he was pulled up by three raps on the desk from the judge's pencil.

'Let us not mention the name of the other woman,' said the judge. 'We will call her "Miss Snake-in-the-grass". *That* is good enough for her.'

When it became the turn of Mr. Jenkin Jones, counsel for the defendant, to cross-examine, he put it to the plaintiff that she was out to catch the man. He, too, was at once pulled up from the Bench.

'Let us assume that she was. The question the jury and I have to determine is, "Did she catch him?" Why shouldn't she? You know in these days the wrong is not all on one side. If she saw a young man she fancied, why shouldn't she tempt him with gifts?'

The relevance of the last remark was the plaintiff's admission that she had bought the man a dozen silk shirts and some underwear.

'I think silk underwear would be very fetching, would it not? Tell me, Mr. Jenkin Jones, did a lady ever give you silk underwear?'

Counsel was understood to reply in the negative, but to add that he lived in hope.

* * * * *

Swift had many another such action, but of all the long line of breach cases to come before him, none attracted more public attention than that in which Lord Revelstoke was the defendant.

On 10 April 1934 the British public, or such portion of it as read the *Daily Mirror*, was intrigued to observe printed upon the front page of that organ a photograph of an attractive girl holding in her hand two pictures of a young man. 'BEAUTY QUEEN TO SUE PEER OF 23', cried the caption, and further paragraphs informed the reader that the lady depicted was Miss Angela Joyce, 'the film actress and Miss England "beauty queen",' while the young man was Lord Revelstoke, against whom she had issued a writ for breach of promise of marriage. Piquance was added by the reminder that Lord Revelstoke had succeeded to his father's barony the previous January, and that he had just returned from his honeymoon, having been married but a month before.

Thereafter occasional paragraphs in the Press informed the public that the action was well under way, and when at last, on

the Friday of Jubilee week, the Associate arose in Mr. Justice Swift's court in London to call on the case of *Dawkins* v. *Revelstoke*, he did so to a crowded audience.

Mr. Neville Laski, K.C., outlined the plaintiff's case to the jury. The plaintiff, he said, was Miss Ivy Dawkins, professionally known as Angela Joyce. She had begun her career in 1928, when she was elected that temporary species of monarch, a beauty queen. In February 1931 she met the defendant, who was then the Hon. Rupert Baring and was an undergraduate at Cambridge. They met on the day before his twentieth birthday. An affection of considerable ardour sprang up between them, and scarce a day passed without his telephoning and writing from Cambridge.

Counsel was reading a number of the defendant's love letters, when the judge pointed out that they were written during Lord Revelstoke's minority: 'I want you to bring before the jury as soon as convenient that which is material to the question they have to decide. That is, "was there a promise of marriage made after Lord Revelstoke was twenty-one?"'

Mr. Laski replied that he was using the letters as material in corroboration, whereupon Mr. Norman Birkett, K.C., the defendant's counsel, remarked that only three of the many letters were alleged to have been written after Lord Revelstoke was twenty-one: 'Our case', he added, 'is that they were *all* written when he was under twenty-one'. Upon that note of conflict the hearing was adjourned until the Monday.

On the second morning Mr. Laski concluded his opening. Lord Revelstoke, he said, had gone to Ireland in March 1931, and had returned much agitated, saying that his father had discovered the attachment and had forbidden him to see her again. He did, however, see her, and continued until the trouble with his father recommenced. They then decided not to see one another for a time. He saw her again in the following February, when he became twenty-one. In April he proposed, but they decided to keep the engagement secret because of his father.

Counsel read the three letters already referred to. These were written, he said, at the time of the engagement. A little later the defendant told Miss Joyce that he had had a scene with his father, who had found one of her letters. He did not want to distress his father, who was in bad health, and they decided to keep apart for a time. In deference to his wish, the plaintiff did not meet him again; in August 1933 she went to Hollywood, and there, in 1934, she heard of the death of the defendant's father and of the defendant's engagement to his present wife, and his marriage.

Mr. Laski then called his client, who gave evidence upon the lines forecast in his speech. She had met the defendant in the cocktail bar of the Cavendish Hotel in Jermyn Street, where they had got into casual conversation. He took her to supper at the Criterion restaurant and saw her home to her flat in Rupert Street. The following day he took her out to lunch, and after that came down from Cambridge three or four times a week to see her. He asked her to elope with him. After his visit to Ireland they decided to break it off for a while on account of his father's hostility. That was in August 1931. In the following December the witness moved to a flat at Russell Square Mansions, and in February 1932 she got into touch with him again. He came to see her, and at first seemed shy and awkward. 'I think he was feeling ashamed for treating me as badly as he did in not getting into touch with me before. Then he sat down at the piano and started playing it. Then he came to the sofa, and told me that he could not live without me and was sorry he had treated me so badly.' After that they wrote to one another as before, and in April he asked her to marry him. This was in the bedroom of the flat at Russell Square, where she had taken him to show him the dresses she was to wear in a new play, 'The Gas Inspector'. 'He did not seem to pay very much attention to the clothes. He was lying on the bed and thinking, and then he said, "Let's get married, Angela". So I said, "Well, how and when, and do you think we shall get over the situation now?" He said, "Yes, I can do what I like now".' Later in June he had come to the stage door of a theatre where 'The Gas Inspector' was playing and said his father was ill and he could not throw dust in his father's eyes any more. They agreed not to meet or write for a while. It was thus at his express wish that she did not get into touch with him again. The first news of his engagement to another person was contained in a letter written to her by a friend when she was in Hollywood.

Mr. Laski sat down. Mr. Birkett stood up.

'Did you think it would be a very painful matter for Lord Revelstoke to face an action of this kind?'—'It is very painful for me.'

'Did you think you had some hold over him because of those letters written in 1931?'—'I considered I had a hold on him on the promise he had made to marry me.'

'Why did you have your photograph taken holding in your hand two pictures of Lord Revelstoke for the public press?'—'There was nothing wrong in that.'

Here Swift intervened: 'The question is not "Why did you

look at his photograph?" It is "Why did you look at it at the moment when a photographer was there who was going to reproduce them in the Press?" '—'Well, I did not want to do it, but they were very persuasive.'

'Have you brought this action for publicity?'—'I have not. It is harmful.'

'You have brought it for money?'—'Damages.'

'Are you telling my Lord and the jury that you, believing that you had a promise from him that you should be his wife, maintained silence for two years?'—'I could not answer for his actions. I only know that he loved me very much indeed, and he was having the most titanic difficulties, and I was not going to aggravate the whole thing.'

Miss Dawkins stood down. Mrs. Mary Wittall was called to give corroborative evidence. She was the owner of the flats at Rupert Street. She had seen the defendant there at the plaintiff's flat. One day the plaintiff borrowed her frying-pan. 'I asked her what on earth she wanted it for, and she said, "To show Robin that I will make him a useful wife as well as an ornamental one".' Witness visited the Russell Square flat in April 1932, and finding the defendant there, said she was glad to see they were together again and apparently going to be married. The defendant appeared to acquiesce in this.

Mr. Birkett, cross-examining: 'How did you know they were engaged?'

Mrs. Wittall: 'There is a very different atmosphere between an engaged couple and an infatuated pair.'

Mr. Birkett: 'What is the difference?'

Witness: 'It is so subtle that it cannot very well be described.'

Swift J.: 'For the edification of some of us who do not know these things, try to tell us what the difference is.'

Witness: 'One is much more quiet and reserved, my Lord, and the other is rather more wild. An engaged couple's actions towards each other, particularly among the higher classes, is extremely shy and reserved and quiet—isn't it?'

Swift J.: 'Don't ask me!'

Witness: 'I'm sorry, but it is. An infatuation is rather a more boisterous form, shall I say?'

Mrs. Wittall agreed that the defendant's letters appeared boisterous. It was put that she never mentioned marriage at Russell Square to the defendant. This she denied. She made a congratulatory speech, she said.

This evidence concluded the plaintiff's case, and the court adjourned for lunch.

Norman Birkett did not mince words in his opening speech. This was a cruel action, he said, and ought never to have been brought. It was an abuse of legal process. There was no suggestion of impropriety, and Miss Joyce had suffered no special damage. It was an action based on an undergraduate's infatuation and brought for nothing but money.

Lord Revelstoke in the box agreed with the plaintiff's account of their meeting. He had been infatuated. He had written her no letters after leaving Cambridge. The three letters alleged to be of later date were written on the paper of the Pitt Club, Cambridge. Marriage had been discussed by them on one occasion when he was at Cambridge. Miss Joyce had said : ' People who are as fond of each other as we are at this moment generally think of getting married '. Asked whether the question was ever raised again, he said, ' Never, to my certain knowledge '.

Lord Revelstoke added that he only saw Miss Joyce once in 1932, that he did not propose to her, that he never visited a stage door, and that he had never seen Mrs. Wittall.

Cross-examined by Mr. Laski, he said that he meant what he wrote in the letters.

' Did you mean it when you said your love had passed the infatuation stage ? '—' I suppose I must have meant it.'

' What did you mean when you wrote that she had paid you the greatest compliment of your life ? '—' I think that was because I was so pleased that she had become infatuated with me as I was with her.'

' Was it not that she had accepted your proposal of marriage ? ' —' That is entirely untrue.'

The defendant's case ended, Swift began addressing the jury.

Readers will observe how well this summing-up illustrates the qualities for which he was noted—the vivid and incisive summarizing of facts, the abundant humour holding the jury's attention and causing ripples of merriment to run from time to time across the court, the simple elucidation of legal principles, the fearlessness in expressing condemnation where he thought condemnation deserved, the practical insight into the habits and actions of his fellow men and women ; all these characteristics are there, and one other. Reading between the lines, it is apparent—not so clearly apparent as it was to hearers of the spoken words in court, but apparent nevertheless—that Swift had made up his own mind as to what the right verdict should be. He said :—

' Members of the jury, this is an action in which damages are claimed for breach of contract. If it had been a contract

for the sale of flour or a claim for damages for breach of an engagement to deliver a truckload of railway sleepers, it would have excited less interest than it has done. Indeed, outside the court we should have heard nothing about it, and inside the court there would not have been a number of curious people coming to hear what was going on. If this had been an action even for breach of promise of marriage in which the plaintiff had been Miss Ivy Dawkins, a shop-assistant, and the defendant had been Rupert Baring, a gas inspector, little interest would have been taken in this case. But because the plaintiff is Miss Angela Joyce, a film actress and a writer, and because Rupert Baring is Baron Revelstoke, considerable interest appears, as you may observe by looking round you or by looking at your evening papers, to be taken in the matter. But so far as you and I are concerned, these things are quite immaterial.'

The dispute in this case was as to whether a contract had ever been made. If made, it had clearly been broken by Lord Revelstoke marrying another woman. As to damages, 'Well, if there were a contract, and if it has not been fulfilled, the plaintiff would have become Lady Revelstoke, and would have been entitled to occupy the position of his wife. She has lost his society; she has lost the position of being a married woman; she has lost the position of being his wife, the wife of a member of the peerage, and you must put that into pounds, shillings, and pence, if it ever comes to a question of assessing damages in this case.'

The jury had to be satisfied that a contract had been made out. But a man did not promise to marry merely by saying, 'You are the sweetest girl I have ever met'. Expressions of that sort might be evidence, but it was not the contract itself, and when they were asking themselves whether there had been a breach of a promise to marry, they had first to find definitely that a contract had been made.

The judge then turned to the evidence. The jury might think that the plaintiff, with her record as beauty queen and film actress, was not ignorant of the ways of the world by the time she was twenty-four. 'In the earlier years of life, a woman is far older than a man; a girl of twenty is far older than a boy of twenty; she knows a great deal more than he does, and is a great deal better able to take care of herself than he is. She was twenty-four when she met this youth of nineteen.

'When you are considering whether at any time there was a promise to marry her, it is not unimportant to remember the way in which they met—at a cocktail bar in a hotel in Jermyn

Street. There is no impropriety whatever in going into a cocktail bar in a hotel in Jermyn Street; on the other hand, so far from being improper, I can imagine most comfortable sensations being provoked by your incursion into such a place; but it is not the place where the ordinary man and the ordinary woman go expecting to meet his future wife or her future husband. They were not introduced to each other by anybody; they simply started to talk. Mr. Laski, in opening this case to you, told you that that was the manner of the young people of the present day. Well, the sooner the pendulum swings the other way the better, I should think.

'Does it strike you as the start of a relationship which was going to lead up to perfect domesticity in the future, and that it was likely to develop into a contract of marriage, which would be ultimately consecrated amidst the sound of church bells and choir-boys? If we want to be honest with ourselves, we had perhaps better not cast our minds too searchingly back to the time when we were ourselves nineteen. You know, boys do fall in love with pretty faces, and they do write letters which in the cold light of this court, and as read by Mr. Laski and Mr. Norman Birkett, sound so different. As read by Mr. Laski they sound like poetry; as read by Mr. Norman Birkett they sound like rubbish.'

But there was not one word of marriage in those letters. The correspondence and the telephoning went on for six of seven months and then stopped. Why? There were two explanations. Lord Revelstoke had said they both cooled off. 'You may think that that is not an unnatural explanation. These sort of infatuations, as your experience of the world must have taught you, do cool off. Very few people, I imagine, marry the first woman they tell that they love—though I am told that they always tell the woman whom they do marry that she is the first girl that they ever did love.'

The plaintiff's explanation, on the other hand, was that owing to the father's anger they decided to see no more of each other for a time. Did the jury accept that?

That seven months' correspondence, Swift added, afforded no corroboration of the promise alleged. Ardent expression was not the same as intention to marry. 'Sitting here, I have occasionally seen correspondence almost as ardent passing between people who could not possibly promise to marry each other.'

The plaintiff alleged that the promise was made in April 1933. But in the following month Lord Revelstoke had become engaged to his wife. 'Ordinary people do not run from

proposing to one woman to propose to another; and you do not propose to a woman unless there has been some preliminary courting. I agree with counsel on both sides, who did not think it right to subject Lady Revelstoke to the discomfort of going into the witness-box. We have not had any account as to how long they had been doing what in some stations of life is called " walking out ", which is, I understand, a preliminary stage to becoming engaged.' When considering whether the promise was in fact made, the jury would have to remember the defendant's relations with his present wife at that time.

Swift went on to deal with the two matters put forward as corroboration. Firstly, the letters said to have been written in 1932: did they contain any reference to marriage? And were they in fact written in 1932, or were they, as the defendant said, part of the series written from Cambridge? And why had not the envelopes, which would have borne a postmark, been kept? Secondly Mrs. Wittall: ' She says: " Upon one occasion I remember Miss Joyce asking for a frying-pan, because she wanted to fry some sausages ". Well, that is not very difficult to understand. They are very delectable things, fried sausages, and to fry them for yourself, or to see somebody else frying them, is the best part of the dish. That may be, but the extraordinary part about it is the remark which Miss Joyce is said to have made, " I want to show Robin that I am as useful as a wife as I am ornamental ". Do you believe that? '

But supposing they did accept the frying-pan story, this could not be corroborative of the promise sued upon, but only of some prior promise made while Lord Revelstoke was still an infant. What was relied upon was Mrs. Wittall's ' congratulatory speech ' at Russell Square Mansions. ' You will ask yourselves whether—without saying for a moment that Mrs. Wittall is coming here to intentionally deceive you: nobody thinks that she is doing that—whether, in the course of this case, which has been so much talked about and so well advertised, she has not persuaded herself that indeed she was at something almost approaching a wedding-breakfast, and did make the speech which she described to you as having made.'

The judge concluded by adverting to Mr. Birkett's condemnation of the case as an abuse of the process of the court. The jury would bear in mind the facts of the alleged engagement —the proposal in April, and the fact that after June neither party saw or even wrote to each other. ' She never wrote to him and said: " I am going to Hollywood. I will remain faithful to you, you be faithful to me." She went to Hollywood and then, in Hollywood, she heard of the death of his father

and she heard of his marriage, which took place in March. Instantly—there was no reason why she should not; if she was right she was entitled to do it—instantly she set the legal machinery in motion, to start to get money, as she has told us, out of Lord Revelstoke. She was entitled to do it if she had got a contract which he had broken.

'It is said by Mr. Norman Birkett, and it is for you to say whether the criticism is justified or not, that this action has been nothing but an attempt to extort money, made without any solid foundation, built up upon the foolish infatuation of an ignorant boy for a woman who was old in comparison in the ways of the world and the habits of men. It is said by Mr. Norman Birkett —truly or not is for you to decide—that this was a cruel thing to do, and that the whole of the campaign of publicity which she and her advisers have been indulging in at the expense of Lord Revelstoke was cruel, and an endeavour to stop him ever coming into this court. "Look here—the *Daily Mirror* of April 10. I cannot have another thing like that. It makes me a laughing-stock. Oh give the woman anything she wants and shut her up. Give her whatever she will take, and keep her quiet!" That is what Mr. Birkett is saying to you. Mr. Laski, on the other hand, is saying, "This poor injured lady was entitled to solace her feelings by gazing at this photograph, and much as I deplore it, it is not her fault if her misguided friends give information to the papers and put things into the papers which she is not responsible for".

'There it is. You must decide between these parties.'

The twelve jurymen filed out. The judge withdrew from the Bench. A babble of excited discussion broke out in the court. Counsel fiddled with the red tape from their briefs. Witnesses fidgeted and laughed nervously. The time of the retirement of the jury after a hard-fought case is always a time of nervous tension. . . .

Exactly half an hour later the jury trooped back again. The court stilled. In silence the Associate asked whether they were agreed upon their verdict. The foreman replied:—

'We find for the defendant!'

So ended *Dawkins* v. *Revelstoke*, a case as characteristically embodying Swift's views upon marriage as did *Betteridge* v. *Rhodes*, with which this chapter started. Within a few months of the latter the judge had tried two famous murder cases, trials demonstrating his powers as a summer-up in criminal cases as conclusively as Lord Revelstoke's case had in civil cases. They were the Brixton taxi-cab murder and the Fahmy case.

CHAPTER TEN

THE BRIXTON TAXI-CAB MURDER

'You must contrast the two stories : you must make up your minds whether you can believe Vivian's story.'

AT about a quarter to ten on the night of 9 May 1923, a civil servant named William George Berkshire was walking down Acre Lane, Brixton, when he heard a hoarse scream appearing to come from a turning named Bay-Tree Road. Looking up, he saw two forms struggling thirty yards up that road. Before he could realize what was happening, two reports rang out, and one of the combatants receded into the deepening twilight, while the other staggered towards Acre Lane shouting incoherently. He stumbled as far as the corner and collapsed.

This man had been shot in the head, and died within a minute. He was subsequently identified as Jacob Dickey, a taxi-driver. His taxi was found standing in Bay-Tree Road near the scene of the struggle; both doors were open, and there was five and threepence on the clock. Close to it on the ground there were found a revolver, a jemmy, a right-hand suede glove, and a gold-mounted stick of unusual design.

Dickey had obviously been murdered and, hardly less obviously, the murderer was the man seen struggling with him. Where had this man gone? At dawn next day the police found traces of flight in the gardens at the back of Bay-Tree Road and Acre Lane, while two ladies living at 15 Acre Lane came forward and said that during the previous evening they had found a man on the wall behind their house and had acceded to his request that he be allowed to walk through the house into the street.

Of the articles found in the road the walking-stick appeared the most individual, and publication of a photograph of it in the newspapers quickly yielded the information that a known thief named Eddie Vivian had been flaunting it in Soho cafés. Scotland Yard had no difficulty in picking up Vivian, and as a result of what he told them, they commenced to look for another member of the thieves' fraternity. This was Alexander Campbell Mason, alias Scottie Mason, alias Scottie Munroe.

Mason was arrested and charged with murder and was in

due course committed for trial. When asked by the magistrate whether he wished to give evidence, he replied that he would reserve his defence, and asked for legal aid. The magistrate answered, ' I cannot give you the benefit of the Poor Prisoners Act unless you give evidence here '. Mason then decided he would give evidence, but the magistrate advised him not to, and in the end he did not.

He was duly committed for trial, and when arraigned on 11 July before Swift at the Central Criminal Court, he pleaded not guilty. Sir Richard Muir and Mr. H. D. Roome appeared for the Crown.

Muir was then in his hey-day as Senior Treasury Counsel. Ponderous, slow, methodical, and thorough, he was one of the deadliest prosecutors of modern times, though his triumphs were triumphs of method and midnight oil rather than of intuitive brilliance; he worked incessantly over his cases, analysing them, sifting his data, marshalling his facts, reducing his memoranda to a series of small cards where his notes were written in different-coloured pencils. ' Muir's playing-cards ' had spelled the doom of Crippen and Voisin in the past, and Mason's advisers must have glanced apprehensively at them as the case commenced.

By now Mason was legally represented. Funds had become available, and Mr. A. C. Fox-Davies and Mr. Brough had been briefed. Fox-Davies is to-day best remembered by his work upon heraldry; in his time he achieved the almost unprecedented feat of doubling a practice at the Chancery and the criminal Bars. His chambers were in Lincoln's Inn, but he made frequent excursions into criminal courts, having, for instance, defended Allaway, the Bournemouth murderer, before Mr. Justice Avory in 1922.

* * * * *

The facts as opened by Sir Richard were relatively simple. On the Sunday previous to the Wednesday of the crime the prisoner had arrived in London from Glasgow, and had been since then a frequent visitor at Vivian's lodgings in Charlwood Street, Pimlico, where the latter was living with a girl named Hettie Colquhoun. Prior to his arrival he had written to Vivian requesting him to obtain him a revolver. Vivian, good friend that he was, had asked a man named Daniel Nunn, who lived off the Waterloo Road, for such a weapon, and on the Monday Mason had met Nunn, and had afterwards shown Vivian a revolver and ammunition, saying at the same time that he had a good mind to take a taxi and ' plant the driver

one ' and rob him. On Tuesday Mason and Vivian had gone to Norwood to do some prospecting with a view to subsequent burglary. They had not on that night committed any crimes, although their money was running short and its replenishment was a matter of urgency. The next day, Wednesday, Vivian was taken ill with food poisoning. In the evening Mason said, ' I must have some money to-night or I shall have no bed ', and he went out alone, taking Vivian's stick and gloves—he had none of his own—and a jemmy. That was 7.30 p.m. At 9 o'clock that night a man hailed the first cab on the rank outside the Trocadero restaurant and drove off. The cab was Dickey's. That taxi, said the prosecution, must have been driven directly to Brixton, for later a policeman had hired a cab at the Trocadero and driven to Bay-Tree Road in order to see how much the meter registered. It was five shillings and threepence.

In Bay-Tree Road the struggle seen by Mr. Berkshire and other witnesses took place. Dickey, said Sir Richard, had been killed for the money he had on him, and Mason was the killer. Mason had himself said as much, for at 11 o'clock he had knocked up Vivian at Charlwood Street saying, ' I have made a terrible mess of things, I have shot a taxi-driver '. He was covered with dirt and there was blood on his hat, and he told Vivian how he had escaped over walls and gardens and been let through a house into Acre Lane. ' It will be the rope for me all right,' he had said, ' but I don't mind as long as I get plenty to eat in there.'

Hettie Colquhoun, who had been out for the evening, had come in later, and the two had told her that Mason had been in a row with some Jews. Mason spent the night on a chair in their room and left the next morning.

When he was arrested Mason had said, ' I suppose it must be about Eddie. I have been out with him on three or four jobs since I came to London, but every policeman who sees you looks upon you as house-breaker if you are in the suburbs after nine o'clock in the evening. I had to climb over about eleven back gardens last Wednesday at Norbury to get away from one. That is where I cut my finger. Eddie was not out last Wednesday; he was ill through eating sardines. I borrowed his stick that night so that I could look a bit posh. Policemen do not follow you up if you have a walking-stick.'

His opening concluded, Sir Richard called his witnesses. They told of the hiring of the taxi, of the struggle and the shots, of the articles found in the roadway. The ladies from 15 Acre Lane were called, and they identified Mason as the man they

had let through their house. An intelligent little girl of fourteen was called, to say that the afternoon after the murder she found a left-hand suède glove in the garden of her uncle's house, 25 Acre Lane. This glove was the fellow of that found beside the taxi.

Towards the close of the first day of the trial the name of James Vivian was called, and a slender, sharp-featured young man stepped into the witness-box. The Crown case was founded upon his story, and the course of the trial would largely depend upon how he fared in cross-examination. In staccato sentences he commenced to recount the incidents already narrated in Muir's opening. Before he had gone far the court adjourned.

The next morning Fox-Davies rose to cross-examine Vivian, and judge, counsel, and reporters awaited his questions with no little interest, for from their shape the still-unknown nature of the defence would be deduced.

Counsel quickly obtained damaging admissions. How did Vivian live? He had done a few little things. Were those little things house-breaking? Yes. Was house-breaking his profession? 'Well, if I am short of money I make it my business to get it.' Had he been in prison? Yes, he got fifteen months in 1922 for flat-breaking. Yes, he had been armed on this occasion, but it was 'an old broken revolver that was useless'. Yes, he had been convicted in 1920 for being armed with a revolver with intent to rob: eight months that time. Before Mason's arrival he had tried unsuccessfully once or twice to get a revolver from Nunn.

Fox-Davies picked up the weapon that had killed Dickey: 'I put it to you that revolver is your property?'—'And I put it to you that is a lie.'

Was this what is called cross-examination to credit, or did these questions foreshadow some startling defence? The impression soon deepened in court that concrete accusations were about to be made. Vivian admitted that the sardines which he said had made him ill on the Wednesday had been eaten as far back as the Sunday. 'Now, Vivian, I put it to you that you were not ill on Wednesday, and that that was a pure fake invented by arrangement with Mason to allay Hettie's suspicions?'—'Nothing of the sort.'

Vivian admitted buying the jemmy found at Bay-Tree Road. 'For what purpose?'—'It is a very handy thing.'

'Burglary?'—'Anything.'

The witness was evidently not anxious to assist the defence; he continually returned evasive answers. Hettie had never

seen the jemmy, he said. Later he admitted she might have seen its outline in his pocket. There had been a discussion as to whether it showed when carried in a pocket. Hettie knew he had been convicted of burglary.

'And she tried to persuade you not to go on with it, didn't she?'—'She did, yes.'

'It was to allay Hettie's suspicions you concocted the story about being ill?'—'Nothing of the sort.'

'At any rate you did allay her suspicions, didn't you?'—'I am not going to tell her I am going to do a burglary, am I?'

Vivian denied ever having used a 'straight-up' taxi-driver on his felonious expeditions. (Apparently 'straight-up' was a synonym for 'crooked'.) But he admitted saying when he was last caught that he could have got away if he had had a taxi. He denied ever having discussed straight-up taxis with Mason or saying he knew where to find one.

Counsel came now to the crime itself. In a court silent save for the rustle of pencils across paper he put it to Vivian that when Hettie had left the house at 8.30 he, Vivian, had got up and joined Mason, that they had separated again, arranging to meet at the corner of Bay-Tree Road, that Vivian had gone to Piccadilly for a taxi, that Vivian had carried the revolver, that Vivian had taken Dickey's taxi, that Vivian had had a dispute with Dickey. All this the witness denied.

'And that you fired the revolver and you murdered Dickey?'

'It is a deliberate lie!'

Fox-Davies sat down.

* * * * *

Here indeed was a dramatic defence! The prisoner was accusing the principal Crown witness of murder; the case was becoming a contest between two denizens of the underworld, a trial of oaths before twelve arbiters, a duel with freedom the prize for success and with the gallows' noose awaiting failure.

Muir re-examined. He asked about the letter said to have been written by Mason asking for a revolver. Fox-Davies at once protested that oral evidence could not be given unless the document were produced. Swift pointed out that according to Vivian the letter had been destroyed.

Fox-Davies: 'The mere fact that it is said to have been destroyed does not bring it within the rules of evidence. I am in your lordship's hands.'

Swift: 'No, we are both in the hands of the law to see what the fact is.'

The judge ruled that oral evidence was admissible, and

Vivian answered the question: 'He said, "Would you try and purchase a revolver for me?" in the letter'.

The witness added that he had seen Nunn from time to time on business. The business was selling certain articles. 'What sort of articles were they?' Various kinds. Pressed, he said they were silver articles.

'And where had you got those?'—'They were the proceeds of burglary.'

Hettie Colquhoun was called: she corroborated Vivian's story, saying that on the night of the murder she left Vivian lying on the bed when she went out at 8.30 and that he and Mason were there when she returned at 11.30. Mason's clothes were dirty. Cross-examined she said she sometimes paid the rent and sometimes gave Vivian money. Her occupation she gave as chorus-girl.

The second day of the trial had almost drawn to a close when Mason stepped from dock to witness-box. He spent the greater part of the third day giving evidence.

He said he had never written asking for a revolver, nor had he ever had one. He had been convicted twice before, and had in fact been in prison in Glasgow before coming to London on the Sunday. On the Wednesday night he met Vivian and went to Victoria Station with him. Vivian was not ill, but merely pretended to be in order to deceive Hettie. At Victoria they separated, arranging to meet, in order to do a job, at Bay-Tree Road. Vivian went to get a straight-up taxi, and Mason walked first to Dan Nunn's place, wishing to borrow some money from him. Nunn was out, and he walked on to the rendezvous. There he had actually seen Vivian commit the murder. In an electric stillness he told how he saw the taxi approaching, but was surprised to hear sounds of argument proceeding from it. It passed him, and he saw it stop: Vivian jumped out and the driver grabbed him. There were reports and both fell to the ground. 'Frightened to death', Mason determined to bolt, and climbed on to a wall behind some houses. There Vivian came upon him saying, 'My God, Scottie, help me, I cannot walk!' They separated, and Mason went along the top of a wall to the back of 23 Acre Lane, where he was let out as the householders had said. He went back to Charlwood Street by tram: having no money, he borrowed his fare from the conductor, who gave him his name and address on a piece of paper. Vivian had arrived before him.

Muir rose ponderously to his feet to cross-examine. Mason had heard Vivian's evidence at the police-court? Yes. He had not put a single question to suggest the evidence was false? No.

'Knowing what you did, you exercised very great self-restraint in not putting any question, didn't you?'—'I did, sir.'

'I dare say you had great difficulty in keeping your secret to yourself?'—'I did that, sir.'

'Why did you keep it?'—'Because I had no money to get legal aid, and I wished permission to ask for legal aid.'

'Why did you want legal aid to denounce Vivian, the false witness and murderer?'—'Well, sir, I wished advice as to the right way of proceeding.'

'What possible reason was there for not denouncing him at once?'—'Because, sir, I was the man who was charged. The police had me in their hands, and I wanted to give no information to them at all.'

Mason admitted he disclosed his defence to no one of the visitors he had had in prison. Here Swift took a hand. 'Why not?' he asked.

'Well, sir, I was alone, absolutely alone. I had no one to help me, and I was waiting to hear from my people to see if they would send someone to help me.'

After a few more questions Mason broke down in the box and the trial had to be suspended to await his recovery. Later he said he first outlined his story in a letter to a friend named Powell. The letter was produced. Presently he was asked about Nunn. 'Is he a receiver of stolen goods?'—'Not to my knowledge.'

'Does he finance burglars who are straight out of prison and without the necessary implements to carry on their trade?'—'Not to my knowledge.'

'When you came to London was it with the intention of resuming with Vivian your occupation of burglar?'—'Yes.'

Sir Richard cross-examined Mason on his prison record, and his story of the crime and the escape, suggesting that it was a concocted story. With his slow, relentless skill he took him through every detail, probing without mercy the points he considered weak, especially the flight through the back gardens. Then he put it to Mason that he had tried to get a girl named Fluffie to prove an alibi for him. Finally he came to the arrest: why had he said Eddie was ill and he had taken his stick to look posh? 'I had promised Vivian when he begged me never to give him away. I did my best to protect him.' 'Did you say, "I was nowhere near Acre Lane that night and know nothing whatever about the murder"?'—'I said that, sir.'

As Muir drew his gown about him and sat down, the spirits of the prisoner's friends in court felt very low indeed. How-

ever, the case was not finished yet. 'Daniel Nunn,' called Fox-Davies, and an old man hobbled into the box to deny ever having supplied the revolver. He turned out to be deaf, and his deafness proved—as is not infrequently the case in the courts—of assistance to him when under cross-examination. His answers to Muir caused such amusement that Swift threatened to clear the court.

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At the close of Mason's case, Muir asked leave to call further evidence: 'Your Lordship sees that what is put forward to-day is a statement, "I was there and saw the murder committed". According to the statement I have put to the witness, one would expect the defence to be, "I was not there, and Fluffie can prove it".'

Fox-Davies protested, but Swift gave permission for one Hook to be called, who related how he had visited Mason in prison and had told Mason that he had heard that Fluffie had said she had been with Mason on the Tuesday or Wednesday night. This hardly seemed helpful, and it seemed less helpful still when he said in cross-examination that Mason had never asked him to get Fluffie to make any statement.

Another day of the grim duel between avenging society and suspected murderer had passed. Another night came, an anxious night, and at half-past ten the next morning, for the fourth and last time, Swift carried his posy of herbs on to the Bench and took his seat beside the City officials. A night's reflection had made the chances of an acquittal seem now more favourable. True, Mason had hardly made a good impression in the witness-box—but, then, neither had Vivian. And if Mason were thought to have been lying, that did not necessarily prove his guilt. That guilt had to be established affirmatively. Vivian's evidence certainly established it, if Vivian were believed; but was it safe to believe Vivian? And if he were not believed, was there a case against Mason? In these circumstances it was obviously of the first importance to search for disinterested evidence which would support or refute either the one story or the other, and this is what was done on the last morning.

A policeman was called to say that he had walked from Victoria to Bay-Tree Road via Nunn's house—a walk which Mason said he had taken between 8.40 and 9.30 p.m. The policeman took one hour and twenty-eight minutes. Another policeman described the marks of flight found in the gardens. There were footprints, but he admitted they had not been

measured. He had searched for other marks, but had to concede that he had not found the glove that the child later found. When Mason's story of this flight came to be checked, it was found that the plan prepared for the use of the jury was faulty; Swift was incensed, and sent the police officer who had prepared it back to the scene to amend it.

In these circumstances Muir was unable to demonstrate, as he had hoped he could, that Mason's story of escape was unbelievable. The evidence of the walk from Victoria to Brixton was telling, but that was only one item of many, and the crux still was whether the jury were going to believe Vivian. Muir, as he surveyed them, felt that they would acquit. They were an intelligent jury: after Mason's story of his walk to Brixton they had asked for a street-plan of London, and a significant request they made on the last morning showed how well they appreciated the Achilles' heel in the Crown case. They had asked for the statement made by Vivian when he was detained. Clearly they wished to test his consistency; but their request could not be granted—the law of evidence prevented Muir putting this in, and Fox-Davies, who could have called for it, dared not take the risk, since he did not know what it contained.

Yes, the shrewd observers in Court No. 1 felt, the Brixton taxi-cab murder case would result in a verdict tantamount to the 'not proven' of Scots law.

Swift, however, thought otherwise. He had followed every point with his accustomed thoroughness, he had narrowly scanned the countenances of the witnesses, and he was convinced that Mason was guilty. He commenced to sum up at 5.10 p.m.

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The crime, he said, must have sent a thrill of horror through every decent citizen who heard of it, and that horror made it imperative that they should be most careful to see that the offence was fully proved before they convicted: 'We must take great care that our horror of the offence, our disgust and dislike of the crime, are not allowed to prejudice us against the man who is charged with having committed the crime'.

And if horror was not to influence them in one way, neither must sympathy influence them the other: 'Something was said to you about the life of the prisoner being in your hands. I do not understand it. You have nothing to do with such considerations. You have been called upon to discharge one particular and peculiar function in the detection of crime and the punishment of malefactors, and that is to determine, upon

the evidence laid before you in a particular case, whether you are or are not satisfied that a particular person has committed that particular crime. You have got nothing whatever to do with the consequences of your verdict; those consequences are, by our constitution, upon somebody else.'

Swift turned to the evidence, first cautioning them that the verdict being theirs alone, they were not bound by any views of his. He described the shooting and the traces of flight, pausing to say that the police failure to take casts of, or even to measure, the footprints was, in the absence of explanation, 'incredible'. He used the same contemptuous adjective in dealing with the police failure to make any note of where the little girl found the glove. After detailing the two versions of Wednesday night's events he asked: 'Are you satisfied on the whole that Mason's story is a lie and that the prosecution have made out their case?' Because Fox-Davies had raised the question he told the jury that if the two men were jointly concerned in a crime and one of them shot a third person in furtherance of the two men's common object, then both were guilty of murder. 'But whatever your theory or your suspicions may be—and it may well be that you have theories and suspicions which are neither the story told you by Mason nor the story told you by Vivian—whatever your suspicions, there is no evidence at all to justify the conclusion that the shooting of Dickey was in furtherance of the common object between these two men.'

Coming to the discrepancies between the stories, Swift first dealt with the allegation that the illness was a fake to deceive Hettie. Of her he said, 'I think, as men of the world, nobody will blame you if you assume she is a walker of the streets; she was going out that night for her illegitimate business, but when you have said that about her, is there any reason why you should disregard the whole of the evidence which she gave you in this case?' He added later, 'Colquhoun knew what Vivian's trade was. It may well be that she did not want him to be caught; it may well be that she thought it was a risky business and that she had rather he gave it up and took to something equally lucrative and less risky; but do you think, living together there, that it is really reasonably likely that it would be necessary to invent a story in order that Vivian could be out without exciting her suspicions?' (He emphasized, too, her evidence that when she came home, Mason was bleeding and dirty, but Vivian was unmarked.) Vivian's illness was mentioned in Mason's first statement to the police. The judge read that statement and contrasted it with the entirely different

story now put before them. When did he first tell that story? He was arrested on 12 May. On 26 May he heard Vivian give evidence in the police court. On 12 June he heard Vivian give the same evidence at the inquest. He gave no hint of the story. True, the magistrate advised him not to make a statement. 'Why, I cannot understand. If he was going to tell the truth, it could have done him no harm whatever to have told it at the earliest possible moment. Many years' experience of courts of law has taught me that the sooner an accused person tells the truth the better for him.' The first mention of the story was in the letter to Powell. 'Not a word of that story to the police; not a word of that story to the magistrate; not a word of that story to the coroner; but having heard Vivian's story twice over against him, he writes down that and tells that story as a synopsis of his defence.'

Well, there was the evidence. 'You must contrast those two stories; you must make up your minds whether you can believe Vivian's story. If you can, undoubtedly that is the man who murdered Dickey; if you cannot, then the prosecution have failed to prove their case, because unless you can believe this much of Vivian's story, that he was at home that night and that he did not go out, then it seems to me you are in the difficulty that you cannot really decide this case because you have not got material enough.'

But 'You have got to judge Vivian's story by the prisoner's'. Let them recall it. Could he have walked to Brixton in the time he said he did? 'Of course, he might easily have got from Victoria to Bay-Tree Road going round via Piccadilly if he took a taxi. If he picked up a taxi at 9 o'clock at the Trocadero, as the prosecution suggest to you he did, he would easily be at Bay-Tree Road, with time to call on Nunn, by half-past 9.'

It was a summing-up strongly in favour of a conviction. Its effect was astonishing. The jury retired for the phenomenally short time of seventeen minutes.

'Guilty', said the foreman.

When called upon, Mason made a speech from the dock worthy of a high place in an anthology of condemned men's utterances.

'My lord, and gentlemen of the jury, I cannot say that I am surprised at the verdict. I have thought—at least I was sure—that, taking the evidence at its face value, I would be found guilty. . . . I have nothing to say against the verdict at all, my lord. I am quite satisfied that I have had a fair trial, and I wish to say a few words here. My people would not help me in my defence, and I wish to convey my thanks to the kind

people in London who have put up the money for my defence, and I wish to thank my counsel for his efforts on my behalf; and if some kind gentleman, say of the Press, just for my own peace of mind—it could have nothing to do with the trial, of course, it will not have—but just for my own peace of mind would investigate that slight corroboration of the driver of the tram and communicate with me before the time comes that I have to pay the penalty, I should be very much obliged. That is all, my lord.'

Swift's clerk placed the black cap on the judge's head, and the grim formula of the extreme penalty was uttered. Mason listened unmoved, a slight smile on his face. The same could not be said of others in court, left limp by the snapping of the four days' tension. Hettie Colquhoun fainted. Outside in Newgate Street the crowd that had collected through the evening began to disperse to their homes. Night was falling; the judge's address had taken nearly two hours, and it was 7.30 before the trial ended. Some stayed on, and they were able to witness one of ironic Fate's grim jests—Mason, convicted of the Brixton taxi-cab murder, being taken in a taxi-cab to Brixton. But it was not Bay-Tree Road he was going to: it was the condemned cell at Brixton Prison.

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After the conviction a wave of sympathy with the condemned man affected the public. Partly this arose out of pity at the fate of the youth of twenty-two whose ingenuous face had looked out so often from the newspapers of the last few days. Partly, too, it arose from an instinctive distrust of the nature of the Crown evidence. This feeling grew, and when a fortnight later Mr. Justice Darling dismissed Mason's appeal, a strong agitation for a reprieve sprang up. A petition bearing 60,000 signatures was presented to Mr. Bridgeman (afterwards Lord Bridgeman), the Home Secretary.

On 10 August the Home Office announced that the sentence had been commuted to one of penal servitude for life.

Why was Mason reprieved? Provocation, pathetic circumstances, mental derangement—these are the usual grounds for reprieves, but none was present here. There can have been only one reason here, and that was doubt—doubt in the official mind as to whether Mason had in fact been proved guilty. As with the case of Steinie Morrison prosecuted by Muir a decade before, it must have been felt that the prosecution had not proved their case with the certainty demanded by the law.

That doubt was not shared by many who witnessed the

trial. Swift, as we have seen, considered Mason guilty, and did not shrink from letting the jury appreciate the fact. Muir was equally convinced, and not less so after he had visited Bay-Tree Road. He had, in fact, true to his reputation for thoroughness, gone to the scene prior to the trial, but owing to a sudden thunderstorm, had not left his car to explore the back gardens. When the reprieve was under consideration he went back with Sir Archibald Bodkin, the Director of Public Prosecutions. This time the weather was clement, and Sir Richard was able to appreciate the terrain in a manner impossible from the defective plan at the trial. His visit convinced him of Mason's guilt. 'I did not realize,' he said, 'the true position of affairs until I actually saw the place. Had I done so in time I could have proved that Vivian could not have climbed over the wall as Mason said he did.'

Despite this report, the prisoner was reprieved. When he heard the news Muir shrugged his shoulders and remarked that Mason owed his life to a thunderstorm.

Such were the views of those who had taken part in the case and had had both the advantage of seeing the demeanour of the witnesses and the disadvantages of being exposed to those queer currents of passion that ebb and flow in the electric atmosphere of a dramatic capital trial. It is possible now to look back across sixteen years and consider the case dispassionately, and any one who reads the evidence to-day (whoever is so minded may easily do so, for the case has been printed in the 'Famous Trials Series') will, I think, be bound to admit that, viewed from many angles, it was an unsatisfactory trial, and that the Home Secretary was justified in his action.

For it *was* unsatisfactory. Some malignant influence seems to have perverted every department of it. The police work, the prosecution, the defence, even the summing-up: they are all open to criticism. Swift's epithet for a part of the police investigation need not be repeated, and the putting in of the inaccurate plan (which a constable had sworn was 'drawn to scale and accurate') deserves the condemnation it received. As for the prosecution, no one of course could say that Muir, great advocate that he was, over-stepped legal propriety, but perhaps his observations upon the expected alibi were a little strong. Then Fox-Davies adhered to an unorthodox style of advocacy which shocked Swift's instinct for correctness and brought him into frequent conflict with the judge. 'Irregular and improper', said Swift of one of counsel's questions; 'a complete travesty of the evidence', he said of another. Fox-Davies was not rattled by these remarks—he replied, 'If your

Lordship pleases', and went on his way—but they could not but create an unfortunate impression.

Even Swift did not escape the malign miasma. There was no misdirection, of course, and he was scrupulous in his anxiety to disabuse the jury of prejudice and point out to them where lay the burden of proof. But once or twice in his comments upon the evidence he gives the impression of being hard. It is difficult to reconcile his stressing of the 'non-disclosure of defence' point (especially after the magistrate's advice to Mason) with his firmly-held views upon the State defence of prisoners. Indeed, the best comment upon this point that was used by Muir and Swift with such force is that Parliament has since altered the law, and a poor person charged with murder now receives free legal aid as a matter of course.

Then, was he not hard in his treatment of Hettie's evidence? In one breath he was inviting the jury to say that, although a street-walker, she was a witness of truth, and in the next he was ridiculing the suggestion that it was necessary to hoodwink her with the food-poisoning story. If he gave her credit as a witness, he might have given her equal credit for a desire to reform her lover, perhaps even shield him if necessary. It is not unknown for women of that class to become attached to the men with whom they live, and he might have reminded them, when they considered whether Hettie corroborated Vivian's story, to bear in mind the relationship between them.

Finally, Swift might have pointed out the situation Vivian was in if Mason's story were true. That was the deadliness of Mason's defence: if it were true, Vivian had the most cogent reason possible for lying. It was impossible fairly to assess Vivian's story without remembering that, according to Mason, Vivian himself stood in the shadow of the gallows. One could not test Vivian's story without assessing the value of Mason's—yet the value of Mason's could not be arrived at without assessing Vivian's. There could be no equating these sliding scales; it would be like trying to solve a single equation with two unknowns, like trying to solve $x + y = 5$ without the corroborative equation $2x + y = 7$. And *that* was the central problem of this case—was there a corroborative equation?

It is not difficult to visualize Mr. Bridgeman reading the passage in the summing-up where Swift emphasized the dependence of the Crown case on Vivian's evidence, and determining that Mason should not hang. Later many people came to regard his decision as providential.

For that was not the end of the Mason case.

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In 1927 Superintendent Francis Carlin of Scotland Yard published his memoirs, in which the seventh chapter was devoted to an account of the police work in this case. He stated that he had been in charge of the inquiries, and he set out two statements made by Vivian upon arrest. According to the superintendent Vivian in his first statement said that, upon receiving Mason's letter asking for a revolver, he, Vivian, obtained the pistol and himself handed it to Mason. In the second statement, Vivian was said to have given an account of Mason's return to Charlwood Street after the murder that differed materially from that related at the trial.

Had those statements been in Fox-Davies's hands in July 1923, the cross-examination would have taken a very different turn, and it is safe to assert that Mason would have been acquitted.

One other extraordinary revelation is made in the superintendent's memoirs. When giving the reference to the letter in the first statement he says, ' I must interpolate here that I secured that letter subsequently, and *it did not mention a revolver*, but asked Vivian to send Mason money '. (The italics are mine.)

If this is true, it would be interesting to know when Superintendent Carlin secured the letter. At the trial, it will be remembered, Swift allowed oral evidence of its contents to be given because Vivian swore it was destroyed. Muir cannot than have known of its existence.

If the superintendent correctly quotes the letter, that alone is sufficient to discredit Vivian as a witness. Nor is it only Vivian whom these remarkable assertions discredit.

Carlin does not seem to have appreciated the gravity of his disclosures, and their import went unnoticed for a time. Then, in 1930, the Hon. H. Fletcher-Moulton edited the case for the ' Famous Trials Series '. So doing, he naturally compared the memoirs with the shorthand note of the trial, and was horrified at the implications of what he found. He cannot believe that Carlin was entirely mistaken in what he wrote, and yet—' The alternative is too horrible. Are we to believe that if these statements had been made by Vivian the police could have allowed his evidence at the Old Bailey to be given without protest—could have sat silent whilst he was denying that he had ever had the fatal weapon in his hands—when the superintendent in charge of the case knew that his original statement had been that he himself had procured it and handed it to the prisoner—and this in a trial whereon hung that prisoner's life ?

'And yet there stand the superintendent's own words as apparent witnesses to such an unbelievable happening.'

It was high time, said Mr. Fletcher-Moulton, for these facts to be brought before the Home Secretary. If the superintendent's account proved true, then he gives it as his thinly veiled opinion that Mason should be pardoned.

Following the publication of this book, an M.P. (Mr. Sullivan, member for the Bothwell division of Lanarkshire) took the hint, and in July 1930 asked the Home Secretary to make a searching inquiry into the reliability of the evidence tendered at the trial. Mr. Clynes replied, 'I am not aware of any ground for inquiry at the present time'.

Nothing was done, and Mason was not then released. Are we to assume from this that Carlin's statements are inaccurate? I am inclined to think we are, though if this is so it is a thousand pities that Clynes did not say so, and thus put the matter beyond doubt once and for all.

My reasons for thinking Carlin probably mistaken are these. Firstly, he had retired when he wrote his book, and is unlikely to have had access to the documents which he professes to reprint verbatim. Secondly, he was then in ill-health, and in fact died before he could reply to Mr. Fletcher-Moulton's criticisms. Thirdly, his book bears internal evidence of hurried writing and its manner is not such as to command confidence. Fourthly, it may be doubted whether he was so closely in touch with the investigation as he would have his readers infer: at the trial Detective-Inspector James Berrett was put forward as being in charge of the case—Muir's first question to Berrett was, 'Have you had charge of the inquiries into this case since the night of 9 May?' The answer was 'Yes'. Carlin was not a witness. Fifthly, the alternative is, as Mr. Fletcher-Moulton said, 'too horrible'. It is hard to believe that a number of police officers were engaged in a conspiracy to pervert the ends of justice.

The proof or disproof of Carlin's statements must be reposing in Scotland Yard's files; it is to be hoped that some day the truth will be officially made known.

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Mason was released from prison in October 1937, fourteen years and three months after Swift had sentenced him to death.

CHAPTER ELEVEN

THE ACQUITTAL OF MADAME FAHMY

'I cannot allow an accused person to think there is anything unfair during the trial.'

WITHIN a few weeks of the Mason case, the Home Secretary had commuted two more death-sentences imposed by Swift at the Old Bailey. But here there was no agitation, no outcry, no controversy, and the reprieves had been foregone conclusions. These two trials were known at the time as the Tottenham murder case and the Kaslopski case. The former was one of those infinitely sad cases where a young man and young woman determine to end their lives together: according to law, the survivor of such a pact is guilty of murder, and here, where the young man had survived, Swift had so to direct the jury and had to pass the death-sentence when the jury found the prisoner guilty. The second trial was not so straightforward. In this a Mrs. Kaslopski, having been told that her baby was paralysed, had taken it early one morning to Westminster Bridge and thrown it into the Thames; she had been about to follow the child when restrained by bystanders. The defence of insanity was raised, and the doctor from Holloway Prison was called to say that in his opinion she was insane at the time of committing the act. Swift, however, viewed the defence unfavourably, and in his address to the jury said, 'Society would be shaken to its foundations if it were for a moment to be believed that a parent was to be the judge whether it was better for a child that it should live or die'. The jury rejected the insanity plea, and the woman was sentenced to death. She was, of course, recommended for reprieve, and the commutation was announced four days later.

There was some criticism of the judge for his unbending attitude in this case, but his motive is clear enough. Lover of children that he was, he wanted the sentence to be a deterrent powerful enough to affect the wavering minds of other mothers caught in the same dreadful situation. In practice the judge's attitude made only this difference to the prisoner, that she would expiate her crime in a convict prison instead of a criminal lunatic asylum—and there are many who, had they

to make the choice, would choose the former. This is a trial to be borne in mind when it is remembered that the judge's lenience, where he felt lenience called for, led some to brand him as a sentimentalist. His view upon these cases of what are nowadays termed 'mercy killings' had received wide publicity—and wide approval—in the previous year when he had charged the Grand Jury of Manchester in a similar instance. There were some, he then said, who thought human life so sacred that under no circumstances should a being be deprived of it. There were others who thought that those whose lives were burdensome should be put away. Between those extremes there might be a happy medium, but however that might be, 'this much is certain, that in the interests of the State it can never be left to the private individual to decide whether another should die or not'.

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The judge certainly had his fill of crime in 1923. He had the unusual experience of visiting the Old Bailey for five successive sessions—June, July, September, October, and November. (There is no August session.) The heavy calendars before him had included eight murder trials. There were three in June, there was Mason in July, and Kaslopski in October, and in September he again thrice presided over the investigation of the gravest of all criminal charges. The Tottenham murder was one of these, another was the Lambeth murder—where a man named Jesse was proved to have killed his aunt and dismembered the body; he was the only one of the eight to be hanged—and the third was the Fahmy case.

This sensational trial opened on 10 September. The prisoner was a Frenchwoman, formerly Mme. Marguerite Laurent, who had only a year earlier married the immensely wealthy Egyptian prince with whose murder she was now charged. A galaxy of counsel were attracted to the Old Bailey, all five of the barristers engaged being either then or subsequently in the front rank of their profession. Three of them—Mr. (afterwards Sir) Percival Clarke, who led for the prosecution, Sir Henry Curtis Bennett, K.C., second string for the defence, and Mr. Eustace Fulton, prosecution junior —later succeeded one another as Chairman of the London Sessions. Mr. Roland Oliver (now Mr. Justice Oliver) was junior for Mme. Fahmy, and her leading counsel was Sir Edward Marshall Hall. That great advocate was then in his hey-day as a defender; he had both 'led' and opposed Swift

at the Bar, but I believe this to be the only occasion when he appeared before him.

Because there is a full account of this remarkable trial in the late Edward Marjoribank's *Life of Sir Edward Marshall Hall*, I do not propose to deal here with it at length. No biography of Swift, however, could pass it over, for not only was it one of the outstanding cases of his judicial career, but it also illustrates more than one of his salient characteristics.

Prince Ali Kamel Fahmy Bey had been shot dead at the Savoy Hotel at 2.30 in the morning of 10 July 1923. The prosecution case, as unfolded by Crown witnesses, was this. Fahmy had met his wife in Paris in the May of the previous year. They had been married in Egypt in the following December. Their association was unhappy and had been marred by continual quarrels. On the day preceding the tragedy they had quarrelled because Mme. Fahmy was anxious to go to Paris for a serious operation and her husband refused to allow her to go. The quarrel had lasted all day; at lunch she had told the leader of the orchestra that her husband intended to kill her within twenty-four hours; in the evening she refused to dance or make it up, and at supper she had said to Fahmy, 'You shut up, I will smash this bottle over your head'.

After midnight a night porter saw Fahmy in the corridor outside his suite; he pointed to a red mark on his cheek, saying, 'Look what she has done'. Soon afterwards the porter heard three shots in succession, and running back he saw Mme. Fahmy throw down a pistol and the Prince lying bleeding on the floor. 'What have I done?' she cried to the night manager. 'Oh, sir, I have been married six months, and I have suffered terribly.'

There could be no doubt that the prisoner had shot her husband, and the Crown contended that the shooting was murder. 'Every homicide is presumed to be murder until the contrary is shown,' said Mr. Clarke. 'In the absence of any circumstances to make it some other offence, you must find her guilty of murder.' He suggested that the position of the wounds showed that Fahmy had been shot in the back while whistling to his little dog.

Something of the horrible setting for the tragedy was elicited by Marshall Hall's questions to the first witness, Said Enani, the dead man's secretary. He knew that his master had been a violent man; he knew that his master had once dislocated his wife's jaw by a blow when expressing his anger at her having been out alone; he knew that his master had written

to the prisoner's sister, saying, 'Just now I am engaged in taming her. Yesterday, to begin, I did not come in to lunch or to dinner, and I also left her at the theatre. This will teach her, I hope, to respect my wishes. With women one must act with energy and be severe.'

Mme. Fahmy had obtained her pistol to protect her jewelry, and when Robert Churchill, the gunsmith, was in the witness-box explaining its mechanism, Swift took occasion to express his opinion upon such practices: 'If there were fewer of these things in the hands of the public we should not be here so often; and I look forward to the day when it will be a criminal offence to have a revolver. A revolver can be of no legitimate use in this country.'

That sounded ominous to the defence; the next prosecution witness, however, gave what was to prove the decisive evidence in their favour. This was the prisoner's doctor, who had been called immediately after the shooting, and who had been with her when she appeared a few hours later at Bow Street Police Court. He related how she had then handed him a letter which she had written to him just before the tragedy, saying, 'Affairs have come to a crisis. My husband refuses to take the responsibility for my operation. I am therefore returning to my family.' She had also at Bow Street given him an account of the shooting, saying that Fahmy had been brutal and had pestered her, that she had fired her revolver out of the window to frighten him, and that he had attacked her when the pistol—which she now thought to be empty—had gone off.

That evidence foreshadowed the nature of the defence. Mme. Fahmy had killed her husband, said Marshall Hall, but she had killed him by accident, and while defending herself against a bestial attack. Many details were given to the jury of the horrible and sadistic habits of the dead man, and presently the prisoner, dressed in deep mourning, went from dock to witness-box to tell the story of her disastrous marriage and of the events in that suite at the Savoy Hotel. After a day of quarrelling, she said, she had gone to her room. Thinking she could use it to frighten her husband, she had shaken the pistol by the window to empty it: it had gone off, and she thought it now harmless. It was a hot, sultry night, she could not sleep, she sat up and wrote the note to the doctor. Presently a thunderstorm broke outside. Her husband came to her room in his night attire; she told him of her decision to go to Paris and asked for money. He flaunted notes in her face and replied that she could have them 'if she earned

them'. She refused what he wished, and he made for her and started to tear off her dress. She ran into the corridor, when he ordered her back, saying, 'I will revenge myself'. She seized the pistol; he came at her, his hands were at her throat, she broke away, and then while the thunder pealed and the rain poured down outside the window, she saw him crouched to spring, heard him hiss, 'I will kill you!' She lifted her arm and pulled the trigger of the pistol. . . . He fell, she could not understand what happened, she fell on her knees, saying, 'Sweetheart, it is nothing! Speak, oh please speak to me!'

Marshall Hall: 'When that pistol went off had you any idea that it was in a condition to be fired?'—'None. I thought that there was no cartridge when you had pulled the barrel and that it could not be used.'

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If the prisoner's story were true, there could be only one outcome to the case. Even had she known the pistol to be loaded, there would have to be an acquittal, for killing in self-defence against a murderous attack is not murder, or even manslaughter. Had she killed intentionally without such provocation, the verdict would be murder. As it progressed, the case troubled the judge more and more. He was palpably anxious that this frail foreigner should suffer no disadvantage at the hands of English justice. More than once when telling her story she had broken down, and the judge had gently suggested that she take time to compose herself. She refused this, however. When, during her cross-examination, it was proposed that a French woman barrister present in court, Mlle. Odette Simon, should act as interpreter, Swift at once agreed. He had no fault to find with the official interpreter, but 'I cannot allow an accused person to think there is anything unfair during the trial'.

Would Madame Fahmy be believed? It was difficult to reconcile her evidence with that of the night porter; on the other hand, beads torn from her dress and found afterwards on the floor supported her story. Between prosecution and defence the case stood thus neatly poised when Marshall Hall rose to make his final speech.

That speech has long since passed into legal tradition as one of the greatest forensic orations of modern times. Passionately identifying himself with his cause, in his enthusiasm recking nothing of personal feelings or even of the comity of nations, he launched a barbed attack upon the dead man, upon the

vices of the Orient, upon the primitive outlook of Egypt towards marriage. Dealing with the shooting, he performed what his biographer has termed the most wonderful physical demonstration of his career: he imitated the crouch of the stealthily advancing Oriental. 'In sheer desperation—as he crouched for the last time, crouched like an animal, like an Oriental, retired for the last time to get a bound forward—she turned the pistol and put it to his face, and to her horror the thing went off.' As he spoke he demonstrated with the pistol, and as he finished he dropped it clattering to the floor of the court just as it must have clattered to the floor of the Savoy Hotel.

That was one of the most tremendous scenes ever witnessed in a legal tribunal. Marshall Hall had worked the court up to a violin-string tensity, and the fall of the weapon produced a shock compared by one observer with those then being produced by Miss Sybil Thorndike at the Grand Guignol theatre. Yet, if the advocate himself is to be believed, the shock was accidental: the revolver, he said, slipped from his grasp. He afterwards told Marjoribanks of a strange thought that passed through his mind when he held the pistol. He suddenly became conscious that he was pointing it at Swift. 'Suppose, I thought, a cartridge were still left in the magazine, and I were to pull the trigger and it were to kill the judge! What a scene!' Marjoribanks subsequently wondered if this was the real reason why he dropped the pistol.

Though the judge was spared this imaginary bullet, he was not immune from the assault made upon his mind. Marshall's speech had done what few advocate's speeches ever did do: it had convinced Swift. That is not to say that he approved of or was swayed by the higher flights of counsel's rhetoric, but Marshall Hall had something more in this case to put at his client's service than his golden oratory: he had facts. The facts were there scattered about the case like a haphazard heap of bricks, and counsel had picked them up and used his histrionic powers to piece them together and convert them from a meaningless heap into a significant interlocking edifice. Swift was proof against oratory—as witness the Bamberger case—but he knew and respected facts, and when he saw them lined up at Marshall Hall's behest into an edifice of innocence, he knew what his course was to be.

As he began his summing up, the beholders were again struck by the contrast between the florid eloquence of counsel and the calm matter-of-factness of judge. His unhurried words, persuasive by their logic and not by tricks of speech,

were as a cooling draft in that overheated atmosphere, effectually reducing to normal the temperature of the fevered court. It was an impressive performance. One newspaper reporter wrote of his 'masterly conduct' of the case, another of 'the masterly lucidity with which he handled the complex issues', and the representative of the *Birmingham Post* said, 'The studied fairness of the prosecution, the impassioned championship of the defence, but, above all, the calm, dispassionate summing up of Mr. Justice Rigby Swift, all have the impression of a great national institution of which we have reason to be proud'.

Characteristically he began by sweeping away all the dramatic devices and prejudices with which the case had been cluttered. He admitted that he had been shocked and horrified by some of the things which he had heard, but they were for the most part quite irrelevant. Soon he came to the core of the case—the truth or falsity of Mme. Fahmy's story. If she was not believed, there was no answer to the charge. Were they to believe her, bearing in mind that she had the strongest motive in the world for telling an untrue story? In solving that problem, they would be assisted by any facts which corroborated her story.

Here Swift laid emphasis upon the feature that had proved so crucial in the Mason case. His emphasis had the same telling effect as in the former trial, but here it told not for the prosecution, but for the defence. Her story—when had she first disclosed it? (Did there flash through the judge's mind the words he had used a month earlier, of Mason?—'Not a word of that story to the police; not a word of that story to the magistrate; not a word of that story to the coroner!') Why, she had disclosed it as soon as she could. Within a few hours of the crime she had told her doctor substantially the same tale as she related in court. This was not a story concocted by lawyers or made up by her when awaiting trial. The judge pointed, too, to other corroborative items, such as the beads.

The jury returned after an hour, and were first asked their decision upon the murder charge.

'Not guilty!'

* * * * *

To understand what followed it is necessary to envisage something of the popular interest surrounding the trial. This was no ordinary murder case: the wealth of the dead man, the exotic background and luxuriant setting of the tragedy, the

hints of dark Oriental vice, above all, the spectacle of the once-gay Parisienne caught up in life's toils and set on trial for life before an alien court in an alien tongue ('it was like watching a butterfly pinioned under a microscope')—all these provided such a profusion of rich dramatic material that an author who had made a play of them would have been accused of fantastic exaggeration. Truth was stranger than fiction, and the public not unnaturally found this breathless drama of real life more enthralling than stage or screen. They discussed it in trains and homes, they packed the streets round the court; and those with sufficient good luck, perseverance, or influence packed the court itself, there to follow the almost unendurable tension of thrusting question and halting answer, of impassioned oration and long, anxious waiting.

When the *dénouement* came, and the end of the story was told in those two words by the foreman of the jury, the breaking of the strain was too much for them. There was an outburst, an amazing scene of cheering, clapping, stamping. The play was over, and the audience were unable to restrain their applause at the successful curtain.

But this was not a theatre, nor, for that matter, was the trial over. Swift was very angry. 'Clear the court!' he commanded, and it was not till the public had shuffled shamefacedly out that the jury's verdict on the manslaughter count was taken. Again the reply was 'Not guilty', and the prisoner was discharged.

This clearing of the court was widely commented upon. Judges had often complained that their courts were not theatres, and had threatened the public with ejection after unseemly occurrences; but here was a judge who acted instead of threatening. 'Nothing at the Fahmy trial,' declared a lawyers' paper, 'was of more importance from the legal point of view than the promptitude with which Mr. Justice Swift suppressed the applause with which the verdict . . . was received by the crowd of sightseers. . . . This is an example of judicial firmness which other judges in similar circumstances would do well to follow.'

It was a striking reminder to the public of what the legal profession already knew, that in Swift the King's Bench had one of the strongest of judges. It was no coincidence the two journalists whose comments were cited above both used the adjective 'masterly'. It was the apt word; no matter how strong the personality of the barristers briefed before him, Swift was always 'on top'. He knew it. Years afterwards he sat as additional judge in the Court of Appeal, where he

had two Lords Justices for superior colleagues. Asked by a friend how he enjoyed the experience, he replied that he did not dislike it—but, he added, with his inimitable Lancashire rendering of the word 'like', 'but I *like* to be master in my own court!'

* * * * *

A few months after the Fahmy case, in the following May, Swift had an unusual judicial experience. Together with Mr. Justice Sankey (afterwards Viscount Sankey, Lord Chancellor), he tried the Oxford Election Petition.

For forty years until 1922 the Conservatives had held Oxford. In that year the standard-bearer of the Liberal Party, Mr. Frank Gray, had captured the seat. He repeated his triumph in the 1923 election. But his triumph in this case was short-lived, for his opponents launched a petition alleging a number of corrupt and illegal practices and praying that the member be unseated, and, as ordered by Act of Parliament, this petition was tried by two judges of the King's Bench Division.

The petitioners' case centred upon alleged irregularities in the election accounts, and the principal issue was as to the conduct of Mr. Gray's election agent, Mr. J. C. Johnstone, a former army captain whom Gray had met when he served under him as a private during the war, and who had been educated at St. John's College, Oxford.

This judicial return to the political arena put Swift upon his mettle, and the long hearing—it lasted five days and judgement was pronounced upon the sixth—disclosed him at his most trenchant. 'Sharp, incisive, with little respect for ruffled feelings,' was one observer's description of him; he might have added 'with an aptitude for calling a spade a spade'. When the agent admitted certain irregularities but said he had told the candidate that the accounts were all right, the judge retorted, 'You lied about it!' He was in similar hard-hitting vein when he came to deliver judgement. The agent, he said, was in a state of abysmal ignorance of election law. 'This is no fault of Mr. Johnstone, but people who employ crossing-sweepers to mend watches cannot complain if the result is not successful.' The allegations he described as being, bluntly, that the accounts had been cooked. And so, he found, they had, and he did not hesitate to employ such terms as 'discreditable', 'bogus', and 'dishonest' in expressing his finding. Distasteful though it was, he remarked, to pass judgement upon one who had done gallant service in the war and to censure one having the 'honour and privilege of

being an Oxford man', he found Johnstone guilty of fraud and perjury. Since corrupt practices had been proved, the election was null and void. Mr. Gray he found to be honest and truthful: 'He leaves the court as he entered it, with his honour untarnished. But he must permit me to say that he has only himself to blame for the unfortunate position in which he finds himself.'

The Conservatives recovered the seat at the ensuing by-election.

* * * * *

The varied nature of a judge's life is well illustrated by Swift's movements at this time. In between the Fahmy case and the Oxford petition he had gone the Northern Circuit, and had also found time to try civil cases in London. One of the latter was destined to make a permanent contribution to English law; the profession knows it as *Brandon* v. *Osborne Garrett & Co., Ltd.*, and it arose out of an unusual accident in a shop. A Mr. and Mrs. Brandon were in this shop when men repairing the roof allowed a piece of wood to fall, breaking a skylight. Mr. Brandon was under this skylight, and was struck by falling glass. Mrs. Brandon was not under it, and if she had stood still would have avoided injury. But seeing her husband's danger, she clutched at his arm instinctively, to try to pull him away from the spot. So doing, she strained her leg in such a way as to bring about a recurrence of thrombosis from which she had at one time suffered. Husband and wife both claimed damages.

Swift found that the workmen had been negligent, and gave judgement in favour of Mr. Brandon in respect of his injuries. But Mrs. Brandon was a plaintiff too, and it was a nice question whether she ought to be compensated by the employers of the workmen for her injury. It was, in fact, so nice a question as to be devoid of all authority, and Swift was faced with the task of deciding a point which had never been decided before. The defendants urged that Mrs. Brandon's injury was due to her own actions alone, and that they should not be made responsible. Her counsel, on the other hand, contended that her action in trying to save her husband was instinctive and involuntary, and must be considered the direct result of the workmen's negligence. Swift found in favour of the wife. There was an old principle of law that where a person is placed by another's negligence in a position in which he acts under a reasonable apprehension of danger to himself, and in consequence of so acting is injured, he is entitled to recover damages. This principle he extended to the present case, where the

apprehension was of danger not to the plaintiff herself but to her husband.

And so new law was made, and any lawyer faced with advising upon similar circumstances to-day has only to turn to page 549 of volume 1 of the King's Bench Reports for 1924 and read the judgement of Swift J. That judgement does more than state the law on this point: it *is* the law on this point.

CHAPTER TWELVE

A MAKER OF LAW[1]

'I speak only two languages—English and forensic.'

CASES like *Brandon* v. *Osborne Garrett & Co.*[2] form a class little known to the general public, but of the highest importance to the State. The man in the street remembers a judge by his murder trials and his witticisms, but the lawyer recalls him by his judgements interpreting and extending the law, preserved not in ephemeral newspapers, but in the calf-bound Law Reports. It is in these solid volumes that his reputation is preserved for posterity, and from these pages counsel will be citing his words in times when the names of Bamberger and Mason and Fahmy will have long since been forgotten. Just as the oddly-turned phrases of seventeenth- and eighteenth-century justices are constantly being read in our courts to-day, so it is safe to predict that, failing some unexpected cataclysm, Swift's words will be used in argument in English tribunals in the twenty-first century—and who dare say how much longer?

What impression will they receive of Swift, these counsel yet unborn? They will grasp his clarity of mind and his common sense at once: it stands out rock-like in his decisions. They will not know the cheery countenance, they will not hear the spicy voice, but they will now and then glimpse the twinkle in his eye. Most they will admire, I think, the lucidity of his style and his ability to purge a legal exposition of the ponderousness that serves so often to cover the law, in laymen's eyes, with drab mystery.

One of Swift's most famous decisions, and the one of which he himself was most proud, was delivered shortly before the Fahmy case. This was *Nunan* v. *Southern Railway Company*.[3] A workman named Nunan had been killed in an accident admittedly caused by the negligence of the railway servants, leaving a widow who, under those circumstances, would ordinarily have been entitled to the compensation provided for by the Fatal Accidents Act. She sued the railway company, but found the case complicated because, at the time of his death,

[1] The footnotes to this chapter will be found on p. 140. They are intended for the information of members of the legal profession and may be disregarded by other readers.

her husband was holding a workman's ticket upon which was printed a condition that ' the liability of the company is limited to a sum not exceeding £100 '. The railway said that that provision applied and that £100 was all they need pay. The widow said, firstly, that the condition was not binding, and, secondly, that if it bound her husband while he was alive, it nevertheless did not affect her claim under the Fatal Accidents Act.

Upon the first point Swift set out what is to-day regarded as the outstanding exposition of the legal effect of that transaction which many of us enter into several times daily: the contract made when a document containing conditions is delivered—be it bus or tram ticket, receipt for goods left, as at a cloakroom, car-park ticket, or the like. He said:

' The proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents . . . whether he reads the document or otherwise informs himself of its contents or not, but that if there be an issue as to whether the document does contain the real intention of both the parties, the person relying upon it must show either that the other party knew that there was writing which contained conditions, or that the party delivering the form had done what was reasonably sufficient to give the other party notice of the conditions.'

Applying those principles, he found that the condition on the workman's ticket bound Mr. Nunan. On the second point he considered the judgements of a number of his predecessors in similar cases, and concluded that Mrs. Nunan was right and that her damages were not limited to £100. He gave her £800. The railway appealed, but unsuccessfully.

In a later Court of Appeal Case (*Thompson* v. *L.M.S. Railway Company* [4]) the Master of the Rolls, Lord Hanworth, expressly adopted Swift's enunciation of the law as to notices and conditions, saying, ' It appears to me that the right way of considering such notices is put by Swift J. in *Nunan* v. *S.R.*' and going on to repeat Swift's words and to add, ' In law it seems to me that that is right '. Swift shortly afterwards had another railway-ticket case (*Penton* v. *S.R.*[5]), and had the satisfaction of basing his judgement upon Hanworth's citation of his own words.

As with Nunan's case, so with many another: appeals from Swift were usually dismissed. His decisions were tested in a higher court on 279 occasions, and in only seventy-four was the appeal allowed. One of the reasons for his success in picking his way through the mazes and morasses of difficult legal problems was that his rugged independence of mind was proof against the persuasive tongues of counsel and that, while he never hesitated to change his mind if an advocate found some aspect of a point which had escaped him, he was never convinced by a show of logic against his better judgement. His ever-present common sense anchored him against that.

TABLE SHOWING RESULTS OF APPEALS FROM DECISIONS OF MR. JUSTICE SWIFT:—

Court Hearing Appeal.	Total.	Allowed.	Varied.	Dismissed.
House of Lords . .	10	5	—	5
Court of Appeal . .	136	47	3	86
Ditto. Interlocutory .	36	19	—	17
Court of Criminal Appeal	97	3	9	85
Total :	279	74	12	193

Lord Hailsham, then Lord Chancellor, said in his Introduction to Mr. Derek Walker-Smith's *Life of Lord Darling*, that 'a judge to deserve the title of "great" should possess deep learning, a firm grasp of legal principle, and a capacity beyond the common for apprehending and marshalling complicated facts'. Those are indeed stringent tests of greatness, and the judges are few who could pass all three; Lord Hailsham went on to say that Darling satisfied none of them. What of Swift? The third, the capacity beyond the common for apprehending and marshalling complicated facts, he had without a peradventure. Deep learning? No, that he had not, and if Lord Hailsham's touchstone is accepted, it is for this reason that he must sadly be denied the title of a great judge. This was the defect of his virtues: a man not of contemplation but of action, he could find no pleasure in the abstruse, and for this reason his devotion to the law was rather to the practice of the courts and the tactics of advocacy than to its underlying philosophy. This attitude found reflection in his judgements, for they evince none of that judicial vanity that sometimes finds expression in lengthy expositions of the history and philosophy of some principle. His decisions were concise:

moreover they were usually extempore. Soon after his appointment, Darling said to him, ' Let me give you a piece of advice : never reserve a judgement ! ' and this counsel he faithfully followed. Rare indeed was it for him to postpone a decision—it needed no quiet contemplation or midnight oil to make Swift's mind up for him. His practicality and lack of vanity showed themselves, too, when he sat as one of the three judges of the Divisional Court. If some senior judge had given a judgement from which he did not dissent, he would almost invariably give his decision in two words : ' I agree '. Multifarious and lengthy judgements have in recent years become a problem to the publishers and readers of law reports, and it will be remembered to Swift's credit that he had no part in aggravating it.

Does this lack of philosophical outlook mean that Swift failed in Lord Hailsham's second test, that he had not a firm grasp of legal principle ? Present-day opinion in the profession is uncertain as to this. In the writer's view this is largely because of Swift's pre-eminence as a judge of fact. That was his *forte* and he knew it : if he could decide a case on the facts, without the necessity of giving an opinion on a disputed point of law, he would do so. His brilliance on fact tended to obscure his competence on law. Yet when his duty required him to decide a question of law he did not shrink from it, and during his seventeen years of judgeship he made a bigger contribution to the case-law of England than is generally realized. It cannot be claimed for him, of course, that he was an outstanding judicial lawgiver—a Holt or a Mansfield or a Blackburn, these figures arise but once in a generation ; yet it can be maintained that he was well above the average of competence, and I am persuaded that posterity will adjudge him to have passed the second of Lord Hailsham's tests. Some of his leading decisions will be mentioned in the remainder of this chapter, while others are touched on elsewhere in this volume,[6] and I think practitioners will be surprised at the number of familiar leading cases that turn out to be decisions of Swift J.

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The judge chanced to decide an unusual number of cases about innkeepers. First came *Aria* v. *Bridge House Hotel (Staines), Ltd.*[7] A Mr. Aria had chosen to dine at that hotel on the night of 16 June 1926, and had parked his car in the hotel car-park. When he did so a polite gentleman in chauffeur's uniform had suggested that it would be convenient to turn his car after entering the park so that it would be easier

to drive it out. And so it was, for after Mr. Aria had complied and had gone off to his dinner, some person did drive it out, and its owner never again set eyes upon it. Seeking consolation, he brought action before Swift against the hotel company. The judge said: 'The law has been for hundreds of years that the innkeeper is liable for the safe custody of goods which come into his hands on his premises and are goods belonging to his guest. In the old days, when inns were remote from the towns and when highwaymen were rampant, it was not an uncommon thing for highwaymen and innkeepers to be in league together, and it was realized in a very early stage of our existence that the only safe thing for the general public was that the innkeeper should be responsible for the safety of his guest and his guest's goods. That law still remains. Exceptions have been made, notably by the Innkeepers Act, 1863. That Act has no application to such a case as this. The company must therefore pay £267 10*s*., the value of the car.'

But an innkeeper, though he is thus liable for loss, is not liable for damage due to defective premises unless he himself were to blame. A few years later another motorist came before Swift complaining that the garage at the Grand Hotel, Northampton, was excessively cold and that when he left his car there the radiator froze and the engine was damaged. His case failed. 'A traveller arriving at a village inn could not complain that he was not lodged in a bedroom heated by radiators,' said Swift. 'The innkeeper undertakes that the accommodation he offers is reasonably fit for the purpose, but he does not warrant that it is the best that can be devised.' [8]

It fell to Swift's lot in 1930 to interpret the Innkeepers Act, to which he had referred in the earlier case. This was in *Carpenter* v. *Haymarket Hotel, Ltd.*,[9] where a lady had lost a diamond ring valued at £45 from the hotel bedroom. That Act, if—as was the case here—its first section is exhibited in the hotel hall, limits an innkeeper's liability to the sum of £30, unless the goods have been entrusted to him for safe custody or his servants have been negligent. (The Act does not apply to 'carriages'—hence the full liability in the *Staines* case.) It was contended that the hotel were not liable at all because the ring was in the exclusive custody of the lady, but the judge overruled that contention and found for her, although he had to limit her damages to the statutory £30.

Another diamond ring figured in a fourth dispute, *Caldecutt* v. *Piesse*.[10] Here a guest at a private hotel lost a ring from her room. Another guest who turned out to have been using an assumed name departed at the same time without the

formality of paying his bill, and it was presumed that the ring went with him. Now, this hotel would pick and choose its guests, and was not open to any Tom, Dick, or Harry; Swift therefore held that it was not a common inn. As a result its keeper neither suffered under the onerous duty of an innkeeper nor enjoyed the protection of the Act. He could be made liable only if he or his servants were negligent. The negligence relied on was the provision of a lock to the plaintiff's door which could not be locked from outside. Swift at first viewed the case unfavourably, saying to plaintiff's counsel, Mr. J. P. Eddy, 'If you are suggesting that a host guarantees his guest against burglary, you won't come and stay with me! If you have guests for the week-end, do you go round trying the locks of the bedroom doors?' Counsel pointed out that the case was altered where the guest was a paying guest, and after some argument the judge was convinced. The hotel-keeper had been negligent, he found, and must pay £50, the value of the ring.

Innkeeper cases are part of the great mass of litigation brought before the courts by road travel. Swift must have tried many hundreds of 'running-down' actions in his time. It is rare to find a point of law in these cases, but one or two did find their niche in the reports. One was *Oliver* v. *Birmingham and Midland Motor Omnibus Company, Ltd.*,[11] where the judge despatched a long-standing legal heresy. A boy of four was plaintiff, and he had been crossing a road hand in hand with his grandfather when a bus bore down upon them. The grandfather leapt to safety, but the child was struck. A County Court jury had found the bus-driver negligent and also that the grandfather was negligent. Upon that finding the County Court judge found for the child, but the bus company appealed to the K. B. Division, saying that the 'contributory negligence' of the child's custodian was an answer to the claim. There was an old decision supporting this view, and there was some logic behind it, for in the circumstances it was the mind of the negligent adult that had guided the footsteps of the child. But there was unfairness too, and Swift refused to believe that the law discriminated thus against children. 'An infant a day old has rights; nobody has any right to injure it by negligence, and I cannot see any difference between an infant a day old and a man of fifty.' He was happy to be able to find the old case not binding on him, and he and his brother Macnaghten J. dismissed the appeal.

The judge was often one of the three members of the Divisional Court taking the 'Crown Paper', a list chiefly

composed of appeals from magistrates and applications to set right the proceedings of inferior tribunals. It was in this court that he heard Mr. A. P. Herbert's unsuccessful application for a summons against the House of Commons Kitchen Committee for retailing liquor without a licence [12]; also *Brown* v. *Joyce*,[13] an appeal concerning the hours of sale of beer at Frinton Golf Club; likewise *Rex* v. *Newport Justices, ex parte Wright*,[14] deciding that a schoolmaster was in order in caning a boy of fifteen for smoking in the street; and also *Winter* v. *Woolfe*,[15] a case resulting academically in the sending down of a number of undergraduates of Cambridge University and legally in sharpening the definition of a brothel. In the same court he concurred in a judgement in 1930 which brought down the whole edifice of the Sunday licensing of cinemas as it then existed. Sunday entertainments were illegal; despite this the L.C.C. had been 'licensing' cinema-owners to open on the Sabbath provided profits were paid to charity. This flouting of the law could not stand judicial scrutiny: 'All bunkum!' said Swift from the Bench, and his brethren agreed, though in more formal language. The thing was a farce, added the judge—'and I know of no authority for bringing up a farce to be quashed!' But the requisite authority was cited and the L.C.C.'s proceedings were quashed.[16] Parliament subsequently passed an Act under which present-day Sunday opening is legalized.

Swift played an important part in a case starting in this court in the previous year and ultimately reaching the House of Lords two years later. This was *Rex* v. *Minister of Health, ex parte Yaffe*,[17] a decision well known to every constitutional lawyer. It was an application to quash an Order approving a housing scheme at Liverpool. This is not the place to discuss the complications of fact and law: suffice it to say that when the case came before Lord Hewart C.J., Talbot J., and Swift J. the two first-named decided in favour of the Order. Swift delivered a vigorous dissenting judgement, and had the pleasure of finding his dissent unanimously upheld by the three judges of the Court of Appeal, which reversed the decision. But, alas, their decision was in turn reversed by the Lords by four voices to one, so that Swift ended in the minority of five as against the six judges upholding the Order. (Later on Swift was assigned to Housing Act cases, and many notable decisions on this branch of law are his.) Another case in which he dissented in good company was *Rex* v. *Commissioners of Customs, ex parte Pegler*,[18] where he dissented from Avory and Talbot JJ. and on appeal found that great lawyer, Scrutton

L.J., siding with him against Lord Hanworth M.R. and Sargant L.J.

Swift's passion for justice and fairness, so fully illustrated elsewhere in this book, is also reflected in two cases in the law reports. One, *Rex* v. *Essex Justices, ex parte Perkins*,[19] was an appeal by a husband whose wife had obtained from the justices an order for maintenance against him. She had previously consulted a certain firm of solicitors, and the principal of the firm was clerk to the justices in question and acted as such when the order was made. (He did so in good faith; the wife had transacted her business with one of his clerks and he did not know that she was his client.) The husband complained that the presence of his wife's solicitor as a member of the tribunal judging his case embarrassed him. Swift agreed: 'It is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiased'. The order was quashed, with costs against the solicitor. The other case was *Rex* v. *Riordan*[20] in the Court of Criminal Appeal, where he sternly criticized the procedure for sentencing a youth to Borstal at the West Kent Quarter Sessions, saying, 'I can imagine nothing which would make a person accused of crime feel more uncomfortable about the justice which was being administered to him than to see without being able to hear the clerk of the court obviously making some communication about him to the magistrates who were going to deal with him. Justice should not only be done, but should also be seen to be done, and I can imagine nothing more unfortunate than the manner in which it was dealt out to the present appellant.' Sentence quashed.

That sorry spectacle, the Gaming Laws, often presented itself to the judge. He was one of those who had in 1929 to uphold the conviction of the then advertisement manager of Spratt's Patent, Ltd., as a rogue and vagabond because he had promoted an advertising scheme whereby prizes were given to those who placed thirteen dog foods in the order of popularity determined by the votes of the competitors. This came within the four corners of the definition of a lottery.[21] In the next month he had to hold a scheme for giving prizes to purchasers of tea also to be a lottery, and two months later he was similarly forced to hold that the O.K. Social and Whist Club, of Liverpool, was 'a common gaming house' because it held whist drives for money-prizes. Progressive whist, said the court, was a game of chance, not skill.[22] In 1931 a case very like the Spratt's case came before him, only here what had to be put in order of popularity were ten rôles played by

Ellen Terry [23]; and in the same year he concurred in holding that 'fruit machines' in a members' club rendered the club an illegal gaming-house.[24] The subject of another of these gambling cases was speculating in differences upon the Stock Exchange. The speculator had conducted his transactions with a half-commission man, who had placed his orders with a firm of brokers. The half-commission man knew that the operations were a gamble and that the shares bought would not be taken up; but the brokers did not know this, and presently they sued the speculator for sums he owed them. He pleaded the Gaming Act. Swift agreed that had the brokers known the true nature of the operations the defence would have succeeded, but held that in the circumstances the plaintiffs were entitled to judgement.[25]

No one knowing the judge could doubt what his views upon these haphazard laws would be, and as early as 1923 he had called sarcastic attention to the one-law-for-the-rich-another-for-the-poor aspect of this legislation, saying, 'If you have a drawing-room of your own, there is quite a respectable amusement called bridge. If you don't happen to have a drawing-room, and play your game of cards on the road, it is a criminal offence.' Towards the close of his career he launched one of his well-known diatribes, telling a jury, 'You may be beginning to appreciate what many people have been thinking for years, and some have been saying: that the betting laws of this country are in a tremendous muddle and that something ought to be done about it. We have had a commission on the subject, but nothing has happened, and, believe me, nothing ever will. It is a hopeless mess, and everybody is afraid to touch it.'

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Every purchaser of a new house has reason to be grateful for another contribution of his to English law. This was *Miller* v. *Cannon Hill Estates, Ltd.*[26] Mr. Miller had visited a building estate, inspected a 'show house', and contracted to buy a house then in course of erection. The house proved damp and not fit for human habitation, and Mr. Miller sued the estate company for damages. Judge Shewell Cooper gave him £91, and the company appealed to the Divisional Court. There Swift laid it down as law that in a contract with builders for the purchase of a house to be erected or in course of erection, there is implied a warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials, and that it shall be fit for habitation. He found that this warranty had been broken and dismissed the

appeal. The importance of this decision as a protection for the public against the activities of speculative builders cannot be over-emphasized.

Other notable civil cases were *Raymond* v. *Wooten* [27] deciding an important point as to house-agents' commissions, *Berry* v. *Berry*,[28] a decision on the relations of law and equity that all students have to learn, and *Pitchers* v. *Surrey County Council*,[29] arising out of the Canadian soldiers' riots near Epsom in 1919: the judge held that a riot was a riot whether it took place on military property or not, and that owners of property damaged could therefore claim the compensation the law allows to victims of 'riot' out of the police rate.

A wife cannot be made to bear witness against her husband. In *Rex* v. *Lapworth* [30] the judge made a common-sense exception to this humane rule, laying it down that where the charge was one of assaulting the wife herself, then she could be compelled to testify: 'I can't see why the State should allow a woman to be half killed and should have her story if she chooses to give it, and should not have it if she doesn't choose to give it. It is not a mere quarrel between husband and wife, but a crime against the peace.' Among his many other criminal decisions was *Rex* v. *Norman*,[31] the classic on the law as to habitual criminals, when no fewer than thirteen judges squeezed on to the Court of Criminal Appeal Bench for the hearing, so important was the case deemed to be. Best remembered perhaps of all his decisions on crime was his noteworthy clarification of that long-standing legal problem—how far can a person consent to be assaulted?

If I kick your shin, that is an assault. But if I do it during a football match, that is no crime. Why? Because in the second case you consent to the risks of the game. But it is not every form of assault to which you can consent; you cannot consent to be battered with bare fists, and that is why prize-fights are illegal. How far can you consent? That question was raised in an acute form in *Rex* v. *Donovan*,[32] where the defendant had been sentenced at Surrey Quarter Sessions to eighteen months' imprisonment for indecent assault. He was alleged to have suffered from some form of sexual perversion, and to have taken a girl to his garage, where he had stripped her and beaten her with a cane. There was evidence tending to show that she consented to this. In deciding the appeal Swift said, 'No person can licence another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent in order to

obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is in one case an innocent act of familiarity or affection, may in another be an assault.' The test, he found, for distinguishing between the two classes of assault was whether the blows were likely or intended to do bodily harm; if they were not, then the prosecution had to establish lack of consent in order to secure conviction. These matters had not been properly explained to the jury, and the conviction was therefore quashed.

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A reader leafing through the pages of the reports will find Swift's name cropping up in unusual places. He occasionally sat after 1934 as additional Judge of the Court of Appeal and rendered several decisions from that august bench.[33] Then his frequent excursions to the Divorce Court—to be described in the next chapter—have left their mark, and it is noteworthy that his judgement in *Warren* v. *Warren* [34] in 1925 was the first of the now lengthy line of cases in which judges have been enthusiastically whittling away the unfairness of the House of Lords decision in the famous Russell divorce case of the previous year. It is noteworthy because the quirks of our divorce law greatly troubled the judge. There is an old saying in the law that 'hard cases make bad law', and Swift, with his humanity and sense of social justice, felt strongly the temptation, when confronted with the occasional case in which to apply the existing law would work hardship, to 'make bad law'—that is, to ignore law in favour of justice. Sometimes, as in *Warren* v. *Warren*, he could find a loophole within the four corners of his judicial oath, and whenever the way was thus open for him to extend the law along the paths of natural justice, he did so with evident pleasure. Indeed, Lord Macmillan, in his essay on *Law and Ethics*, has taken Swift's 'judicial recognition of the moral virtue of altruism' in *Brandon* v. *Osborne Garrett & Co.*[35] as demonstrating his thesis 'that, within the law, ethical considerations do influence the judgements of our courts when they are free to give effect to them'. On other occasions Swift was denied this freedom; no loophole presented itself, and then the conflict within the judge's breast between duty and desire would produce one of his celebrated explosions. Once it led him farther—led him to commit, in circumstances to be narrated in the next chapter, what, looked at in cold blood, was undoubtedly a flagrant illegality.

Yes, if Swift had a fault as a lawyer, it was that he was too human. So far as I have been able to ascertain, he always, with that one exception, resisted the temptation to ' make bad law ', but his strong feelings would crop out in other ways: he would in hard cases strongly urge the parties to settle out of court on terms that would do greater justice than his judgement could, and some people said that his sympathies led him now and then to award injured persons larger damages than was usual. Once, when he awarded £10,000 to a boy of seventeen whose hands had been crushed in a machine, the sum was thought so excessive that the defendants appealed.[36] They failed.

But it was divorce cases in particular that called forth the strong feelings dwelling in the breast of this so human judge.

[2] [1924] 1 K.B. 549.
[3] [1923] 2 K.B. 703.
[4] [1930] 1 K.B. 41.
[5] [1931] 2 K.B. 103.
[6] E.g., *Newton* v. *Hardy*, 49 T.L.R. 523, *post*, p. 211; *Beresford* v. *Royal Insurance Co.*, [1937] 2 K.B. 197, *post*, p. 224; *Cleghorn* v. *Oldham*, 43 T.L.R. 465, *post*, p. 223; *Woolmington* v. *D.P.P.*, [1935] A.C. 462, *post*, p. 230; *Rex* v. *Stone*, 53 T.L.R. 1046, *post*, p. 278.
[7] 137 L.T. 299.
[8] *Winkworth* v. *Raven*, 47 T.L.R. 254.
[9] 47 T.L.R. 11.
[10] 49 T.L.R. 26.
[11] [1933] 1 K.B. 35.
[12] *Rex* v. *Campbell, ex. p. Herbert*, [1935] 1 K.B. 594.
[13] 47 T.L.R. 200.
[14] 45 T.L.R. 477.
[15] 47 T.L.R. 145.
[16] *Rex* v. *L.C.C.*, 47 T.L.R. 111.
[17] 46 T.L.R. 178.
[18] [1928] 1 K.B. 523.
[19] [1927] 2 K.B. 475.
[20] 53 T.L.R. 433.
[21] *Hobbs* v. *Ward*, 45 T.L.R. 373.
[22] *Rex* v. *O.K. Etc. Club*, 45 T.L.R. 570.
[23] *Challis* v. *Warrender*, 47 T.L.R. 123.
[24] *Daniels* v. *Pinks*, 47 T.L.R. 166.
[25] *Weddle Beck & Co.* v. *Hackett*, [1929] 1 K.B. 321.
[26] [1931] 2 K.B. 113.
[27] 47 T.L.R. 606.
[28] [1929] 2 K.B. 316.
[29] [1923] 2 K.B. 57.
[30] [1931] 1 K.B. 117.
[31] [1924] 2 K.B. 315.
[32] [1934] 2 K.B. 498.
[33] E.g., *Joseph* v. *East Ham Corporation*, 51 T.L.R. 579; *Skelton* v. *Epsom Council*, 52 T.L.R. 494.
[34] [1925] P. 107.
[35] *Ante*, p. 127.
[36] *Heaps* v. *Perrite, Ltd.*, [1937] All E.R. 60.

CHAPTER THIRTEEN

DIVORCE

'To my mind the divorce laws of this country are wicked and cruel.'

SINCE time out of mind the Divorce Court has been congested with arrears of cases awaiting trial. At no time has this congestion been worse than in the 1920's, when the aftermath of war-time tragedy combined with the war-created loosening of former standards of conduct to pile up long lists of divorce petitions patiently awaiting hearing.

At that stage the division consisted of but two judges, and their time had to be devoted to what was to them, no doubt, the more congenial work of Probate and Admiralty cases, as well as the hearing of divorce petitions. Lord Birkenhead, when Chancellor, descended from time to time from the Woolsack to assist them, sacrificing his Saturdays for this purpose. But even the great 'F. E.' could make little headway against the rising tide of matrimonial infelicity, and as a more practical measure to relieve the understaffed, overworked division, the practice arose of lending to it one or more King's Bench judges to assist with the matrimonial causes. Swift was packed off upon this errand within a week of being sworn in. And there he remained, with the exception of one day, for the balance of the Trinity sittings of 1920.

He had had occasional divorce briefs when at the Bar, briefs in cases where it was thought desirable to bring in a common-law silk for cross-examination purposes, but in 1920 he could hardly be said to be familiar with matrimonial law and procedure. Throughout that first term he sat in the unfamiliar court, absorbing the unfamiliar practice, accustoming himself to the unfamiliar isolation of the Bench, saying very little—but wondering a great deal about the cases brought before him.

The bulk of the cases he tried that July were undefended petitions; the majority of them were founded upon a single act of adultery alleged to have been committed at a hotel; the greater part of them took their inception from a letter written by the guilty husband or wife requesting the other partner to

take proceedings. 'I have met someone who is ready to throw in his lot with mine. We go together to-morrow to stay at the —— Hotel, ——, and there you can get all the necessary evidence to divorce me, which I implore you to do, for both our sakes.' So wrote the erring wife in one of the cases of that summer, and letters in almost identical terms were read out day by day as case after case came on. A procession of hotel bills passed from counsel's hands to the Associate's table, were identified by the witnesses, and lodged themselves on the judge's desk. A procession of hotel registers followed the same course, and a procession of hotel waiters and chambermaids followed them into the witness-box and out again. Swift said little, save the continual refrain of the Divorce Court—'decree nisi, costs; decree nisi, costs; decree nisi, costs'—but what he saw was having a profound effect upon his mind.

The effect upon some persons would have been to produce a state of cynicism. But Swift's generous, frank mind was utterly incapable of that refuge; one cannot think of any attitude more diametrically opposed to his character than cynicism. Unable thus to clothe his mind in that easy armour, he found it inevitably affected, disturbingly affected, by the phenomenon of the arranged divorce. Some judges, no doubt, while similarly deploring such cases, content themselves with the reflection that they are administering the law as in duty bound, and that it is the legislators, and not they, in whose hands the remedy lies. But Swift was never content to act as a mere piece of judicial machinery. He was man first, and judge afterwards, and those who knew him, knew his hatred of shifts and subterfuges, his love of openness and honesty, could have prophesied that one day he would speak his mind upon divorce.

In that first term Swift said nothing. He granted the decrees as was his duty. He performed, when called upon to do so, the unwelcome task of assessing the cash value of a lost wife. In one case—a bad case, where a man had used his wealth to seduce a married woman and had afterwards left her—he assessed the wife's value at £500 and ordered the co-respondent to pay that sum to the husband.

That was 1920. Five years later Swift came back to the Divorce Court, again to assist the attack upon the arrears. By now he had long since found his feet upon the Bench, long since developed the habit of outspokenness. In the meanwhile he had, too, tried the Bamberger case, the revelations of which had served to confirm the suspicions he had entertained upon his first visit to the matrimonial court.

And now as the ' letters before petition ' commenced once more to flow across his desk, as the hotel books were handed in and the hotel chambermaids slipped one by one into the box and out again, his friends could anticipate with some confidence that this judge, who so well knew his own mind, would before long see to it that the outside world knew his mind too.

He commenced to sit on 30 March. The explosion came on 22 April. On that day he had before him an undefended petition in which one Simmonds, an iron-moulder of Oswaldtwistle in Lancashire, who sued as a poor person, prayed for the dissolution of his marriage. His wife, it appeared, had signed a confession of adultery, while the husband had signed a document undertaking to pay fourteen shillings a week towards the maintenance of two of his three children and consenting to the third child living with the wife. The apparent bargaining that had preceded the petition was the spark that set fire to Swift's indignation.

' Has the law on the subject of collusion been altered in this court ? ' he inquired. ' I ask because I am very interested to know exactly how collusion stands nowadays. Quite half these cases are collusive, but that is not always a reason, in my view, for refusing relief to an injured spouse. Indeed, half the petitions for divorce now are in fact, though not in form, brought by the guilty party ; he or she writes to the injured spouse, and says : " Please divorce me. You will find ample evidence to support a petition if you inquire at the —— Hotel. You will find that I was there on such a night, and, indeed, I enclose a hotel bill." Divorce is now rapidly becoming a relief for the guilty instead of a remedy for the innocent. I am very interested to know how far it is going. Many of these cases are a perfect farce, and the legislature had very much better let these people go before a Registrar of Births, Marriages, and Deaths and record the fact that they no longer desire to be married. In the present case, before starting the proceedings a bargain was made as to the maintenance of the children, and the custody of the eldest child was handed over to the wife, who thereupon signed a confession, upon which the proceedings were founded. If that is not collusion, I do not know what is. That is buying a divorce.'

After hearing further evidence the judge dismissed the petition and said, ' I am still considering whether to send the papers to the Public Prosecutor '.

Widely reported as they naturally were, these words caused a storm. The righteous welcomed them as an attack upon

laxity, though they were perturbed by the reference to Registrars. The ungodly hailed them as a step towards divorce by mutual consent, though it saddened them to observe the allusion to the Public Prosecutor. Leader-writers up and down the country used them as pegs upon which to hang moral essays; divorce practitioners hastened to deny that collusion accounted for anything like fifty per cent. of their work; and the general public, it must be admitted, were a trifle mystified. Some mystification was excusable, for, like the majority of Swift's celebrated utterances, this was spoken from the heart and without premeditation. He was voicing the disgust of a straightforward man with a system whereby a person desiring a divorce is driven publicly to commit, or to pretend to commit, adultery, and his suggestion as to a declaration before a Registrar may well have sprung spontaneously into his mind as he commenced to speak. Many persons assumed that this suggestion was not made in earnest, was an attempt to shock the public conscience by the use of hyperbole. He took pains, however, to disillusion them on the next day, by which time he appreciated the sensation which his statement had caused.

For on the next day he chanced to have a ' hotel case ' before him. Addressing the petitioner's counsel he said: ' This is a typical example of the class of cases which was in my mind when I said that a very great many of the cases in this list were collusive. . . . There is an element of collusion here, obviously. It is a case in which the parties, after a period of married life, separate. After they had lived apart for some time, one of them—possibly both—desires that the marriage bond might be broken, and for the purpose of enabling that to be done, the man—in some cases, it is the woman—goes and registers himself at an hotel, takes a woman there, furnishes the names of witnesses, and then invites his wife to ask the court upon that to say that he has been guilty of adultery. The wife in no way colluded in that, and the court, being satisfied that for the particular purpose of this divorce adultery has taken place, will and indeed must pronounce a decree.

' In the case of *Simmonds* v. *Simmonds* which came before me yesterday, where there was clearly collusion, I ventured to say that in this class of " hotel-letter cases," and I was speaking only of these " hotel-letter cases ", I thought it would be much cleaner and better if, instead of a man having to go to an hotel and commit a sin, a marital offence, in order to get a divorce, under these circumstances the husband and wife might attend before a proper officer and make a declaration

to the effect that they did not desire to live together in matrimony any longer.

'I did not mean by that to suggest that divorce should be "free". . . . The court would still inquire into all the circumstances, would still exercise its discretion as to whether it would grant a divorce, with the substitution of a declaration before a responsible officer in place of a declaration before an hotel reception clerk and a physical exhibition before a chambermaid.'

He granted the decree in this case, for he was satisfied that the petitioning wife was not a party to any bargain.

I am not sure that the lesson of these two contrasting cases was not rightly put by *Truth*, which said, 'The moral of it is the old one that poor and ignorant persons must not try to imitate their betters and obtain divorces by mutual consent'. The well-to-do petitioner in the second case, knowing the ropes, took his 'woman unknown' to the hotel without informing his wife of his intention, thus avoiding a technical collusion. His wife, receiving the hotel bill, and also knowing the ropes, knew what to do with it, and the divorce was in due course achieved. The iron-moulder of Oswaldtwistle, on the other hand, made the fatal error of discussing the arrangement with his wife beforehand—and was threatened with the Director of Public Prosecutions. The second case contained, as Swift said, an element of collusion, and it was obviously of that element that he was thinking when on the previous day he had stigmatized half the cases before him as collusive. He was then clearly using the word 'collusion' in its popular, and not its legal sense, a fact partially accounting for some of the public misapprehension. Collusion in law is confined to a bargaining between the parties; for a respondent to facilitate a petitioner's quest for evidence is not legal collusion.

With his blunt and logical outlook, the judge had recognized that divorce by mutul arrangement exists in fact, though not in theory, in England, and he wished to sweep away the unclean subterfuges whereby the fact was made to fit the theory that divorce is a reward for the innocent and a punishment for the guilty spouse. The remedy which he put forward found little favour, and indeed was, in the condition of public opinion then and now, bound to find little favour, and therefore the problem continued, and still continues, unrelieved—indeed, accentuated—by Mr. A. P. Herbert's recent Act. Criminals rarely beseech the police to prosecute them in order that they may be sent to penal servitude, nor do defendants in civil suits as a rule ask plaintiffs to sue them for damages; but in the

Divorce Court the 'criminal' in the great majority of cases is so desirous of receiving what the law deems his punishment that he is willing to undergo degrading indignities in order to incur it. That is the phenomenon that continues to cast an unreal air over the Divorce Court, and continues sometimes to exacerbate the temper of those called upon to preside over it.

It certainly exacerbated Swift's temper from time to time. He saw a good deal of divorce work during the remainder of his days upon the Bench: he returned to the Divorce Division in London in the summer of 1929 to assist for a fortnight with the perennial problem of arrears, and—because he went circuit a great deal and because Assize divorce was bulking ever larger in the circuit picture—he encountered matrimonial cases in all parts of the country. 'If the public only knew what is going on and what is being done in this court,' he said at Birmingham Assizes in 1927, 'there would very quickly be some reform of the Divorce Court. It is perfectly scandalous that people should be driven by the present state of affairs to immorality.'

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Some people, remembering the judge's serious suggestion for divorce by declaration before a Registrar, and putting beside this portions of his later declarations, have concluded that he entertained a lax attitude towards sexual morality. Nothing could be further from the truth. The judge's code was of the strictest: 'I am above all things an early Victorian,' he once said, and no one deplored more than he the slackened standards that were from time to time reflected in these cases. On more than one occasion he expressed publicly his disquiet at the readiness with which the younger generation were willing to break up their married life. He was horrified in one case when a young servant-girl admitted continuing in the service of a respondent and co-respondent after discovering that they were not married. 'We are coming to a very loose state of morality,' was his comment.

On the other hand, he saw no good reason why, if a marriage were irretrievably ruined, the legal tie should be preserved. Moreover he believed in facilitating local divorce. On one day during his last year on the Bench he refused to take an Assize divorce case in priority to the jury cases and thus keep the jury waiting. That night he appreciated that refusal as reported in the evening papers might create an impression that he was opposed to hearing divorce on Assize. He quickly corrected this the next morning. 'Do not let anybody say

I disapprove of divorce on Assize,' he announced, 'because I don't. The undefended divorce cases are most pathetic, and I think they all ought to have every consideration and be brought here on Assize.'

One or two instances will illustrate the meticulous care with which he watched undefended divorces. In one, the inevitable chambermaid was in the box. An accommodating young woman, she willingly answered 'Yes' to each of counsel's leading questions. Had she taken breakfast to room so-and-so? Yes. Had she seen the occupants of the room? Yes. Would his Lordship allow her to see the photograph in the case—was that the man she saw in the room? Yes.

Counsel asked for a decree.

'You haven't proved your case,' said Swift.

'With respect, I thought I had, my Lord.'

'Ah, but, you see, I *inadvertently*'—Swift's eye twinkled—'passed to the witness the wrong photograph. The one she identified was one used in a previous case. That shows the value of this evidence. *Now* what are you going to do?'

Counsel thought he would like to recall the witness. Very well. The young woman returned to the box. The correct photo was handed to her. She examined it closely. She scrutinized it from several angles. Seconds passed. The court became very still.

'Yes!' she said.

Decree nisi!

Even divorce cases have their humorous moments, and Swift never saw reason to withhold his wit if an occasion presented itself. One Northern Circuit counsel asked once for a decree on somewhat slender evidence. 'Do you think there is sufficient evidence?' Swift asked him. 'Yes, my Lord.' 'Ah, Mr. Blank, you always had a suspicious mind!' Another counsel, arguing in favour of an alleged erring husband's innocence, mentioned his client's war record. Swift stopped him: 'To my mind there is no inconsistency between gallantry on the battlefield and gallantry in the boudoir!'

Judges invariably find the most difficult part of divorce work is awarding custody of the children. To Swift, with his affinity for young persons, it was an especially anxious task. Once on Assize he found that a poor woman, a respondent, had come to court not to deny misconduct, but to plead that her boy, who she said was delicate and needed her care, should not be taken from her. The case came on, but the judge refused to decide the custody question till the next morning, when the boy, who was not then present, could be brought

to court. The wife had come a long journey to the Assize town, and had no money for a night's lodging. Swift sent for the female bailiff, told her to find the woman shelter, and gave her two pound-notes from his private purse for her needs.

The next morning, when the question of custody was argued in the judge's room, the wife came to thank him with tears in her eyes. He brushed her thanks aside. 'Don't talk to me about that. What I am bothered about is who should have this child.'

Eventually custody was awarded to the husband.

An extraordinary case of this nature came before him at Leeds Assizes in 1933, when a respondent husband appeared to ask for custody of his eight-year-old child. This man was the subject of custody himself, for he appeared with a warder, and was found to be undergoing a sentence of seven years' penal servitude for the attempted murder of the petitioner, his wife. It took a lot to astonish Swift, but the idea of an incarcerated convict applying for possession of his child certainly took him aback. The result of the application was, of course, never in doubt, but Swift went on to point out how fortunate it was for the wife that the husband had added to his many offences the commission of adultery, otherwise she would have been bound to him during the years he spent in prison: 'Cruelty and attempted murder and seven years' penal servitude are, in this country, no ground for the wife obtaining her freedom from her husband; fortunately the wife satisfies me that his activities as a man were not solely confined to beating and ill-treating and attempting to murder her, but were directed to procreating children by other women.'

I rather fancy that as he spoke those words Rigby Swift's mind went back across fifteen years to his part in the Rutherford case, and to its sad sequel in the House of Lords.

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Swift's solicitude for the welfare of children, his passion for justice and for facing facts, and his irritation with the channels into which English law forced marital difficulties to flow: these things combined with ill-health to produce at Birmingham in March 1937 his last and most famous onslaught upon the law he was forced to administer.

This onslaught—perhaps better described as an outburst, for it was an outpouring of a generous soul's indignation, unrestrained for the time being by prudence or any other consideration—this outburst came on two consecutive days, the 15th and 16th of March, the divorce days at Birmingham

Assizes. On the first day he refused damages to a petitioning husband, saying, ' You can't assess the value of a wife as though she were a chattel. She is not a piece of furniture. You can't treat her as though she were a piano and say, " How much a leg did you pay for it ? " What did the husband lose when a woman who could no longer live with him went away and left him ? He lost nothing—nothing ! ' On the same day a woman came before him proposing to prove her husband's adultery. But she did not ask for divorce ; she asked for a judicial separation, because she had conscientious objections to divorce and because, she said, she felt the tie of matrimony could not be severed for ever. By the law of this country she was entitled to what she asked for. And no doubt she asked for a separation from the highest of motives and in obedience to the dictates of her conscience. But to Swift her application seemed monstrous, and he said so :

' If she believes that her husband who left her is living in adultery, what a farce to come to this court and say she does not believe in divorce because those whom God has joined together should not be put asunder ! I do not know whether the fault was on her side or his, and I do not care. Something happened to separate them. It might be his fault, it might be hers ; but long before they came near this court they were divorced. Those whom God has joined were put asunder. They only come here to have the label of matrimony removed, and this woman comes here and tells me she did not want the legal tie abolished. She wants to have some control still over her husband. And so she shall. She shall remain married to him so far as I am concerned.'

He refused to grant the judicial separation. He acted illegally, of course. And unwisely as well, since the only result of his action was to add to the legal costs that the husband had eventually to pay, for the wife appealed to the Court of Appeal, which inevitably had to grant the judicial separation. The explanation of his conduct is, of course, that he was then a sick man. But nevertheless, and despite all these things, I sometimes think that this imprudent illegality was magnificently characteristic of the man who hated humbug, who hated cant, who saw things clearly in black and white, and who wanted above all to do justice.

Counsel briefed in cases for the second day at Birmingham came somewhat apprehensively into court, wondering whether the judge would be in the same mood of indignation after a night's reflection. They soon found out that he was. It fell to the lot of one of them to call into the witness-box a young

girl who was to give evidence that both her father and her mother were living in adultery.

When he looked at that girl and heard the miserable story that was being put to her, Swift saw in this case the quintessence of all that he had abhorred and detested in the divorce laws of England since the days twelve years before when he had startled the public by his plea for a cleaner and a better way. He felt rising again within him the indignation that he had voiced so soberly in that earlier day, an indignation tinged now by a bitterness brought by the passing years. The tide of protest rose within his breast till it would not be denied. He granted the decree, and he spoke on, speaking those things that had for so long accumulated within him clamouring for the relief of utterance. He said:

'It is most terrible that these unhappy people, who have long since made up their minds that they cannot live together—in this particular case they have been separated for sixteen or seventeen years, and have both made fresh alliances—it is dreadful that, having been separated all that time, so that one side or other may regularize their position it is necessary that a daughter should have to be called to prove her mother's adultery.

'Those who talk about the sanctity of marriage, those who talk about "whom God hath joined together", those who lay the greatest emphasis upon "let no man put asunder", do not see, or do not realize, the pain and suffering which come into the witness-box.

'What dreadful stories I have heard to-day! . . . And now this petitioner comes here and tells me they want to be separated. Why should they not be? They have—in fact, in truth—been separated for sixteen years. They want to be separated in law But in order that they might be separated in law, the wretched daughter has got to be brought here to tell me on oath that she knows that for fourteen years her mother has been living with a man who is not her father, and that her father has been living with a woman who is not her mother.

'Do not let it be said that I do not approve of divorces at Assizes. I disapprove of the whole system, wherever it may have to be carried out. To my mind the divorce laws of this country are wicked and cruel.

'These people ought not to be subjected to the dreadful indignities to which they are subjected, and I wish some of those learned ecclesiastics who have so much concern for the well-being of society would come and sit here (the judge pointed to

the well of the court) where they would be mere spectators, or come and sit here (indicating the Bench) where they would have to deal with these matters.

' It would not be long before the divorce laws of this country were altered.'

Those words were spoken in March 1937. In July 1937 the House of Commons at last passed a Bill giving effect to some of the recommendations of the Royal Commission of 1912 upon divorce reform. How far those words, coming as they did from the senior judge of the King's Bench Division, contributed to the change in public opinion represented by the passing of that Act it is impossible to estimate, but that they had considerable influence no one will deny.

Swift died three months after the passing of the Act and three months before it came into force.

CHAPTER FOURTEEN

ON CIRCUIT

'I am a commercial traveller in justice.'

SWIFT loved going circuit. He was a good circuit judge because he had the happy knack of sustaining pomp without becoming pompous. Justice on Assize is accorded a degree of dignity denied to it in London, and age-old forms prescribe frequent public ceremonials for the itinerant judges. Swift believed firmly in supporting the dignity of his quasi-royal position, and entered whole-heartedly into the solemn and majestic pageant of Assize. Yet so doing he never became infected with the vain pride of high office; in truth he was a man who could walk with kings nor lose the common touch.

'Quasi-royal' is no exaggerated term for the Assize judge's status. Swift in London is coldly regarded by the tables of precedence as quite a minor star, being sandwiched between the Lords Justices of Appeal and the younger sons of Viscounts, but Swift on circuit is another person altogether, and ascends to the highest pinnacle of that catalogue, for in virtue of his royal commission of Assize he becomes the King's personal representative in the shires, and is accorded deference as such.

What an amazing and thoroughly English institution the Assize is! King Henry II sent his justices round the shires in the twelfth century, and for seven hundred and fifty years since then the judges have continuously made their allotted peregrinations. Change comes unwillingly on Assize. There were no hotels in the twelfth century, and travel was a perilous task—therefore in the twentieth century the judges still travel with a retinue, and they still lodge in private houses provided especially for their use by the counties they visit. No two judges' lodgings are alike. At Durham, Swift would be housed in the Castle and at Swansea in the Mansion House, while at Cambridge it was his privilege to oust the Master of Trinity from his Lodge—and to invite him back to his own house as guest.

The retinue has doubtless diminished in size since the Middle Ages, but still it consists of five persons—the marshal, the clerk, the butler, the cook, and the marshal's man. Though

the counties staff the lodgings with under-servants, the judge, as is seen, provides the two principal servants. And he pays his way, too, for he is personally liable for the household expenses. These are large, since his position demands considerable entertaining, and judges rarely have much change left from the allowance of £7 10*s*. a day they receive from the Treasury when on circuit.

The office of marshal is a curious survival. In the Middle Ages the marshal was the master of the horse, supervising the travelling arrangements for the judge's cavalcade. To-day he has undergone metamorphosis into a social secretary and personal companion. He pours the judge's breakfast coffee and says grace at the dinner-table. He follows the judge in the ceremonial procession to the courts and sits on his left hand on the Bench. He attends to the judge's social correspondence, plans the seating at dinner-parties, and sees to it that proper respect is on all occasions paid to the royal representative.

Many celebrated men have held the office of marshal. Mathew Arnold, for instance, used to go circuit with his father-in-law, Mr. Justice Wightman. The appointment lies in the discretion of the judge, and is made afresh for each Assize. Some judges prefer as companions men of their own age, but the majority do as Swift did and ordinarily take young men. The majority of Swift's marshals were fledgling barristers—and the experience of sitting with a judge on the Bench is, for obvious reasons, especially valuable to the young barrister.[1]

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The pageant of Assize used to commence with the arrival of the judges in the county town. Until comparatively recent years the High Sheriff of the county would attend at the railway station and receive his Majesty's justice, possibly with a military escort. It is still the duty of the sheriff to provide this welcome ' in state ', but as a rule the judges now request that it be dispensed with. Once Swift received an unexpected reception in state. The under-sheriff of the county in question had written to the judge's clerk stating that a formal reception had been planned and would be accorded unless declined by telegram. The letter arrived at the courts on the morning of departure, and was brought to Waterloo by a messenger. When it was read, on the train, it was too late to telegraph,

[1] A list of the judge's circuits and marshals is printed in the Appendix to this volume.

and too late for the judge's robes to be unpacked. So Swift in a lounge suit was received by the sheriff in the full-dress uniform of an admiral of the fleet, and taken in an open carriage to the lodgings, attended by a mounted escort and heralded by the fanfares of trumpeters.

On one other occasion the judge made a state entry, by design this time. This was at Carlisle, at a season when very little work awaited him there. To save time and expense, he arranged to stay at the next circuit town, Lancaster, and go over from there to Carlisle. He robed in the train, was ceremonially greeted at the railway station, and was conducted straight to the court, where an hour sufficed to deal with the calendar.

Though he agreed on dispensing with the state entry, the judge saw no necessity to relax further the dignity of Assize. His worst enemy could not have called him either vain or officious, and in private life he cared little for forms and observances, but when clothed in the mantle of justice he felt it his duty to exact the respect properly due not to him, but to his office. His stern control of his court formed one facet of this creed of his; another is seen in his requirement that all things be done in their due order on circuit. More than one county official learned the judge's views by bitter experience. Among them was the under-sheriff of a certain Midland county.

At non-state arrivals it is the duty of the under-sheriff to meet the judge and accompany him to the lodgings. At the town in question that official once was waiting at the railway station in a brown suit and a cap. Swift was affronted. 'Why are you not properly dressed?' he demanded.

The under-sheriff explained that he had had insufficient time to change. The judge was not mollified. 'I do not require you. My marshal will see me to the lodgings,' he said—and ordered the carriage to drive off.

The under-sheriff was left standing on the pavement.

Ordinarily the ceremonial commences on the first morning of the sittings. Then the judge robes at his lodgings, and the sheriff calls with his chaplain and conducts him to the court, where trumpeters greet him with a fanfare. Some few towns —Derby and Bristol for instance—keep a stately but uncomfortable glass coach for the journey between lodgings and court, but in most instances the sheriff now furnishes a motor-car. When he does so the judge (or judges, if one of the more important towns, visited by two judges, is concerned) sit upon the rear seat, and the sheriff and his chaplain balance upon the small folding seats. On one occasion a High Sheriff

is said to have provided a car for Swift in which the small seats were so constructed as to face frontwards, thus obliging sheriff and cleric to turn their backs upon the judge. This thoughtlessness, as he considered it, greatly angered Swift, and he let his views upon the matter be known without a peradventure. The exact form taken by his protest is not known, for the strictest secrecy is preserved by those aware of the happening, but he was widely believed to have imposed—as he was entitled to do—a heavy fine upon the sheriff. If he did, the fine was no doubt remitted, for his anger never lasted long.

There is one other principal occasion on which those splendid robes are seen that entitle the bearer of the commission of Assize to be called ' the red judge '. (' In the circuit the judges go . . . in scarlet robes, hoods and mantles ', ran an edict of Charles I.) That is the Assize service, which takes place in towns either on the morning of the first working day or on the first Sunday of the Assize. At these services the sermon is preached by the sheriff's chaplain. Once in Lancashire the chaplain was dining at the lodgings a night or two before the service and complained of the difficulty he had experienced in finding a suitable text.

Swift instantly remarked: ' Try I Samuel vii. 15—" Samuel went on circuit " ! '

That Sunday, Swift heard what he considered to be one of the best Assize sermons within his experience. The full text was: ' And Samuel judged Israel all the days of his life: and he went from year to year in circuit to Bethel, and Gilgal, and Mizpeh, and judged Israel in all those places.'

That incident draws attention to a quality of Swift's, hardly suspected by many of his friends—his piety. He was a man of deep religious convictions, and he had the abundant faith that was of a piece with his strength and single-mindedness. It is the literal truth to say that the Bible was his favourite reading. One of his first actions upon arriving in fresh lodgings was to inquire whether there was a Bible in the house, and Foyle, his circuit butler, would always see to it that there was; providing a Bible was part of the preparation for residence when Swift was coming. Again, he was anxious to see in court that the Testament used for swearing witnesses was treated reverently. It not infrequently happens that people giving evidence pick up the Testament in order to illustrate some point, such as the position of a motor-car. Swift would forestall this by instructing the usher to remove it from the witness-box each time the oath had been administered.

At one two-judge town Swift's colleague was for some

reason absent on Assize Sunday. This judge's marshal stayed on at the lodgings, but since his judge was not there, he saw no necessity to attend the service. He played tennis instead. Swift, returning from church, was horrified to find the young man dressed in flannels. 'Marshal,' he said, 'to-night you shall do penance. You shall read two chapters of the Bible—aloud.'

And he did.

* * * * *

The ample leisure of circuit life Swift occupied in many ways.

At the outset he played a good deal of golf, and would take country walks. But he gave up golf in 1933, and was never especially fond of exercise; towards the end of his career he took less than was good for him, particularly when Lady Swift was not there to see that he looked after himself. He used to go to football or cricket matches whenever the opportunity presented itself. He was at the Swansea *v.* Cardiff match at Swansea when Cliff Jones, the Welsh International, was badly hurt. Hearing that Jones was a law student, the judge insisted on going to the dressing-room, and chatted with him while he was awaiting the ambulance.

His indoor recreations were—in ascending order of preference—bridge, listening to music, reading, and conversation. Bridge he played badly. His taste in music was simple: he liked the old-fashioned airs, and marshals were at a premium who had sufficient mastery of the piano to play his favourites, *Drink to me Only* and *Home Sweet Home*; during his latter years a musical hymn-book formed part of the circuit baggage. Most of his spare time on Assize he spent reading newspapers and law books. Easily his favourite volume, after the Bible, was that *vade-mecum* of the criminal lawyer, *Archbold's Criminal Pleading*. He was fond of giving copies of this book away; he gave copies to marshals and friends, he gave a copy to the Liverpool Corporation upon discovering that the Law Library at St. George's Hall did not possess the latest edition, and once he presented one to a lady who at a dinner-party had evinced interest in his exposition of some point of the law of crime.

But his favourite recreation was always conversation, and his chief joy, whether for circuit or at home, was to surround himself with those with whom he could talk. He was a great raconteur: lawyers are notorious for talking shop, and he knew all the legal stories ever circulated and could hold a table spell-

bound with his anecdotes of his own early struggles at the Bar. Part of his great success as a circuit judge was undoubtedly his enthusiasm for the social aspect of circuit life.

* * * * *

For there is conviviality as well as pageantry on Assize. There are civic dinners; there are dinners with the Bar Messes; there are formal dinner-parties at the lodgings; there are smaller dinners and lunches, and—when Swift was the judge—even breakfasts. Swift enjoyed these festive opportunities to the full and invariably spent more than his treasury allowance. He liked always to see friendly faces about him, and it was noteworthy that for the most part they were young faces. Young in heart himself to the very end, he delighted to mix with those still full of the ardours of youth; the apprentice hands at the Bar found themselves sharing with the silks the invitations to the lodgings when Swift was the red judge.

Children, too, disturbed the decorum of the lodgings on those occasions, and many a round childish hand has signed the leather-bound ' circuit book ' that the judge took with him for the preservation of his Assize memories. One May evening at Salisbury, where the lodgings are one of those rare old houses in the Close, he was taking a stroll with his sister when they met the headmaster of the Cathedral Choir School.

' Headmaster,' said Swift, ' I want you to do me a favour. Send in to breakfast with me to-morrow the three best boys in your school. The next day send in three more. And on my last day send in the three worst ! "

The headmaster complied, though he refrained from telling the third three why they were chosen. When the guests afterwards compared notes, it appeared that the bad boys had been entertained upon a distinctly more lavish scale than the others.

Swift spent most of his spare time with the schoolboys on that occasion. He watched them at cricket beneath the shadow of the great spire of the cathedral, and on the Sunday of Assize week he invited the entire school to tea, finishing by hiding pennies and sixpences for the boys to find. The then headmaster, to whom I am indebted for this information, writes, ' I never saw him again, but his name always rekindled the memory of the boyish enthusiasm and pleasure written all over his face when those young people were all around him '.

He carried his interest in young people on to the Bench with him. His solicitude for the innocent victims of divorce suits

has already been referred to. He was equally painstaking with the young sufferers from road accidents whose monetary compensation he so often had to assess. Children would be taken to his room and coaxed with sweets to run little races in order that he might see how far their limbs were affected.

Once at Liverpool Assizes he was told that a mother in the cells awaiting trial had been denied her baby. He was very angry: 'Let the baby be taken to its mother. They are not to be parted without order.'

It was the tragedy of Swift's life that he himself had no children.

* * * * *

The judge travelled most his well-beloved Northern Circuit. Eleven times he thus revisited the scenes of his youth. His next choice was the Western Circuit, which he went five times. Those he liked least were the two Welsh circuits—once only did he go round South Wales and twice round North Wales. There was too little work for his taste in the principality; besides, he found Welsh juries less amenable to reason, as embodied in his summings-up, than their English counterparts. A Swansea jury once disagreed in a breach-of-promise action which Swift regarded as a clear case for the plaintiff. Furious, he sent them back to reconsider their verdict. Again they announced a disagreement, and again were sent back. Still the dissenting minority held out, and at last he was forced to discharge them, at the same time thanking them sarcastically for the assistance they had given 'in the administration of justice'.

Swift held hardly more regard for Welsh witnesses than for Welsh juries. Once he was on a two-judge circuit with a newly-appointed colleague; the latter came to the luncheon-table one day with the news that a witness in his court had just fainted.

'You'll get used to that,' commented Swift: 'on the Welsh circuits they faint all the time.'

'What do you do?'

'Oh, I see there's a doctor in court and then leave the Bench.'

'When do you return?'

'In time to hear them say, "The feet of them which have carried her out tarry yet at the door"!'

The other judge also knew his Bible, and was able to grasp the full significance of this paraphrase of Acts, Chapter V, verse 9.

In his seventeen years of doing justice from Appleby to

Exeter and from Maidstone to Beaumaris he tried many thousands of cases. Many of his best-known trials were circuit cases—the Sinn-Fein trial at Manchester, for instance, and the Seymour case at Oxford. Among the lesser trials deserving of rescue from oblivion is one which he tried at Bodmin in 1928. It was a murder case, and its scene was laid close to the wild Atlantic coast of northern Cornwall.

* * * * *

Early in that year two somewhat unusual characters were living within a few miles of one another and not far from the town of Bude. The first, Richard Francis Roadley, was an eccentric miser. He was wealthy—how wealthy no one knew, though speculation upon the extent of his fortune was rife in the bar-parlours round about—but although he was eighty-four years old, he liked to live by himself in considerable squalor in a small and lonely cottage at Titson near the village of Marhamchurch. The other person was less than half that age, and attracts attention on account of his picturesque way of earning a living. William Maynard was a rabbit-catcher, and a rabbit-catcher on no small scale. Living at Poundstock, just off the Bude–Boscastle road, he exploited the trapping rights over a great number of farms in several neighbouring villages. He operated nearly a thousand traps and gins, and his operations had become so extensive as to necessitate his employing two assistants.

During the night of Saturday, 18 February, Roadley was fatally assaulted. He was found on the Sunday afternoon lying in the living room of his cottage, with a terrible wound in the front of his head, from which he died before he could be moved. The place had been ransacked. Upstairs a brief-bag was found, slit open, its contents missing. Among the articles scattered in confusion were a bank passbook and receipts for War Loan amounting to £1,526.

The Cornish police wasted no time; they immediately sent to Scotland Yard, and by the Monday evening Chief Detective-Inspector Prothero and Detective-Sergeant Sprackling were searching the cottage. These officers set the local constabulary the task of interrogating every person who was in the neighbourhood of Roadley's cottage on the night of his death. For some days this routine work went on. Neighbours were interviewed, passers-by were interviewed, tramps were interviewed. Daily the circle of inquiry widened, until on the following Saturday a police-sergeant arrived in Poundstock and saw the rabbit-catcher. Maynard appeared nervous,

and before the sergeant had time to question him he said, ' I know what you are come about. It is that Titson case. If I had done that I would go and hang myself.'

No great significance seemed to attach to that observation, for after all the most worthy of citizens might be pardoned a little nervousness when being interrogated in connection with a murder—and all Cornwall knew what it was that the police and the Scotland Yard men were after. So the sergeant proceeded with the task—which he had probably got heartily sick of by then—of cautioning the man and taking down his statement. It was a seemingly innocuous statement, accounting for the time of the crime by stating that he was then at his bungalow, and that a Mr. Yeo and his wife and two children were there too. But when the sergeant had put his notebook away he told Maynard that he would be detained : and he sent for Inspector Prothero.

For the sergeant knew from Mr. and Mrs. Yeo that although they had been at the bungalow that night, the rabbit-catcher had not. The inspector took him to the police-station, and there Maynard made another statement. Again he said he was at home on the night in question, but he added, ' I don't want to tell you any lies. I don't know what cause I had to do so. Bert Yeo was not there.'

Maynard was detained in custody. The next day he volunteered a further statement. In this he said that he had arranged with another man (whom he named) to break into Roadley's cottage, and that the other man had gone in first and killed the old man. He also identified a number of places where portions of the loot had been hidden : ' At the gateway of my father's premises, where the oak tree and the holly tree are, I placed the two watches in a tin and buried them in the ground. In a rabbit's hole in the hedge leading to father's farm, about a gunshot and a half from where I had buried the watches, I stuffed my cap.'

He was then charged with wilful murder, and in the following June he came up before Swift at Bodmin Assizes. The prosecution proved the prisoner's statements, and they proved a conclusive alibi for the other man implicated by the last statement. The inference was irresistible that the prisoner had committed this brutal murder for gain. In the witness-box Maynard denied having made the third statement : ' They made the statement themselves, four or five men pulled me back and fore and worked my hands and made me sign it '. It was the last desperate lie of a man fighting for his life—desperate and transparently thin, because the police had found the watches

in the tin beside the oak tree, and they had found the cap in the rabbit-hole. How else, as Swift inquired in his summing up—how else could the police have found them there if the prisoner had not told them? Maynard himself—or so it seemed to those present—realized that he was struggling as vainly as a rabbit in one of his own well-sprung gins. Unlike the majority of murderers, who are known to the courts as brazen witnesses, he continued during the two days' trial to exhibit the nervousness that had first attracted the sergeant's attention and, though a man of powerful physique, he collapsed under cross-examination. He was found guilty.

Though it was the year's sensation in the duchy, there was little of drama in this sordid and brutal case, and the issue of the trial had never been seriously in doubt. The interest it holds is derived partly from its simplicity—it was one of those elemental murders for avarice which seem from time to time to spring out of the very earth of primitive country districts—and partly from the way in which Maynard convicted himself out of his own mouth. Apart from the story of the discovery of the crime and the medical evidence, the Crown case consisted entirely of the prisoner's own statements and the matters, such as the finding of the stolen property and the other man's alibi, arising out of them. Had he kept his mouth shut, even the skilled trappers from London might have spread their snares in vain, and Maynard might have been alive to-day, a free man, suspected perhaps, but never convicted.

He forgot that to the criminal silence is golden.

CHAPTER FIFTEEN

THE OLD BAILEY

'Everybody is honest and dishonest in patches.'

ONE day at Winchester Assizes, an eminent junior counsel (now a silk) mentioned to Swift the fact that the prisoner in the case before him had previously been sentenced at the Old Bailey.

Judge (in a tone of pained astonishment): '*The Old Bailey*, Mr. Blake Odgers?'

Counsel (soothingly): 'Ah, doubtless your Lordship is aware that I am referring to the Central Criminal Court, but knowing your Lordship's insatiable thirst for information, I ventured to add the name of the street in which it is situate.'

Judge: 'I am much obliged to you, Mr. Blake Odgers, not only for naming the court correctly, but also for informing me of that part of the metropolis in which it is situated.'

To the young articled clerk present in court who told me the story that delightful passage between Bench and Bar seemed a reminder of the more spacious days when reproof and courtesy walked hand in hand. To those who knew Swift it is a clear illustration of the pleasure the judge took in being 'answered back'. To the reader it may serve as an introduction to that famous building which stands in position of Assize Court for London and parts of the Home Counties.

The red judges visit the County Assizes three times in the year—four times in the case of the three busiest towns, Liverpool, Manchester, and Leeds. But there are twelve annual sessions at the Central Criminal Court, at each of which one King's Bench judge tries the more serious cases, and the law of averages therefore sees to it that the judges gain a large part of their criminal experience in the City of London beneath the great sky-line statue of Justice with her sword and scales.

Swift's first criminal trial, it will be remembered, was at the Old Bailey, and many another of his great cases had the spacious No. 1 court for their setting. It would be impossible, even were it desirable, to treat a tithe of his Old Bailey cases in this book, but mention must be made of a few that live in public memory. First comes one of the most macabre crimes known even to that court of dreadful secrets. Terrible,

horrid, gruesome, sickening—these were some of the adjectives employed by the judge in his summing up in the *cause célèbre* of 1927.

'William Davis, are you a shoeblack?' With that question, put by Mr. (afterwards Sir) Percival Clarke, there began the evidence in the case of the Charing Cross trunk murder. The sensation-seekers who had been standing all the morning in the queue for the public gallery leaned forward, and the packed court heard in silence the shoeblack's story of his picking up of a cloak-room ticket in Charing Cross Station courtyard on the afternoon of 6 May. There was artistry in the calling of this man as the first witness, for his short evidence—it took less than a minute—at once carried the minds of the hearers back to the hot days of May when the newspapers were ringing with the discovery of a mysterious crime.

It was on the 10th of that month that a railway official had his attention called, for reasons that need no elaborating, to a large black trunk that had been standing in the cloak-room for four days. He prised it open. What he saw caused him to send post haste to Bow Street.

The police took it away, and it was examined in the presence of Chief Inspector George Cornish. It was found to contain the dismembered body of a woman. It also contained a number of articles of clothing, some bearing a certain laundry mark, and a duster.

Here obviously was a crime of the first magnitude, for the police doctors were certain that death had been caused by suffocation after a violent blow. Two main problems faced Inspector Cornish: whose was this body; and how did it come to its death? The depositor of the trunk must be traced. Three avenues at once presented themselves for his pursuit. These were the trunk, the railway station, and the clothing, and Scotland Yard men were quickly pursuing each of these lines of investigation. The first brought immediate results, for publication of a photograph of the trunk in the Press led a portmanteau dealer in the Brixton Road to come forward and identify it as one he had sold. But he could not remember the exact date of the sale, and he was vague as to the purchaser. Dead-end on that avenue! The railway station was hardly more helpful. Davis the shoeblack was found, but his story of finding the cast-away ticket merely showed that the owner had no intention of claiming his property—and that was a fact that hardly needed proving. A porter could recollect handling the trunk, but no one could remember the depositor. Dead-end again! The clothing avenue, however, proved a better

thoroughfare. The laundry-mark was traced to a Kensington address, where the lady of the house identified one of the undergarments as her property. She was mystified at its presence in the trunk, for she had thought it to be lying in her wardrobe. Scotland Yard, however, had heard of pilfering servants before, and asked for a list of the lady's recent maids. Her description of one of them tallied with the description of the body, and the remains were presently identified as those of her former cook, Mrs. Bonati. When not employed as a cook, this woman apparently earned a living in a less reputable manner. Her landlady was traced: she had last seen Mrs. Bonati at 2 p.m. on May 4th. About four o'clock on that day she was found to have visited the Chelsea relieving officer. After that no one could be found who had seen her. A number of her male friends found their lives being minutely investigated, but these without exception were proved to have no connexion with the crime.

So the third avenue, though it afforded a longer run, had, like the others, reached a dead-end.

At this point a witness came forward whose story afforded the vital link in uncovering the crime. If Edwin Sharpington had not read of the hue and cry and remembered that on 6 May he had conveyed a man with a black trunk in his taxi-cab from Westminster to Charing Cross, it is difficult to see how the police would ever have come to investigate certain offices in Rochester Row. Inspector Cornish bent all his energies on this clue. The taxi-man was uncertain as to his times, but remembered he had taken his previous fare from the Royal Automobile Club to the Westminster police court in Rochester Row, and that as soon as he had been paid off he saw the man with the trunk hailing him from a doorway immediately across the road. Here Scotland Yard's meticulous attention to detail is illustrated: they traced the previous fare, who well remembered the time, because he had had a pressing appointment with the Westminster magistrate in the matter of a motoring summons. He had paid the taxi off at 1.35 p.m. The fatal trunk had been deposited at Charing Cross at 1.50 p.m. The times fitted. Inspector Cornish was now pretty certain that the trunk in Sharpington's taxi was the one he was looking for, and not another of the hundreds of black trunks that daily make taxi-journeys in London. He ordered a thorough investigation of the offices opposite the police court.

These belonged to a solicitor, and one of the solicitor's clerks remembered a trunk standing in the passage-way after lunch on 6 May. He had no idea how it got there. There

seemed nothing unusual about the solicitor's premises. But upstairs there were some vacant offices, and the way in which they became vacant attracted the detectives' attention. They had been rented by an estate agent named John Robinson, and although Robinson had paid his rent up to 16 May, he wrote on the 9th to his landlord saying, ' I am sorry to inform you that I have gone broke, so cannot use the office further '.

A search of the office yielded no clue ; nevertheless the police felt they would like to see Robinson. They visited his lodgings, but found he had left there suddenly on 10 May. They searched his room, and there luck, which had been so conspicuously denied them hitherto, turned in their favour. They discovered a letter from the post office stating that a telegram addressed to ' Robinson, Greyhound Hotel, Hammersmith ' had not been delivered, as the addressee was unknown. This hardly looked a propitious clue, and no doubt the officers did not recognize it for the lucky stroke it was, but, true to their reputation for thoroughness, they visited the Greyhound. When they arrived at Hammersmith, however, they must have been as near excitement as policemen ever permit themselves to be. For at the hotel they found Robinson's wife. She willingly told them that she was meeting her husband that night at six at the Elephant and Castle.

This was on 19 May. A detective-sergeant joined that rendezvous at the Elephant and Castle hotel, and by half-past six the elusive Mr. Robinson was talking to Inspector Cornish at the Yard.

Robinson seemed to have no objection to discussing his movements with the Inspector. He had heard of the trunk murder, because he had read of it in the papers ; he had never bought a black trunk nor gone with it to Charing Cross ; he had left his office because he was in truth ' broke '. Asked if he had any objection to being put up for identification, he agreed with a candour assuredly born of innocence, and when the trunk-dealer, the taxi-driver, and the station porter all failed to identify him, Cornish had of course to bid him good night and tell him he was a free man. The Chief Inspector was a little puzzled, nevertheless. Had the trail started by Sharpington led only to another dead-end ?

On 21 May there was a conference at Scotland Yard. Eleven days had passed since the grisly contents of the trunk had been uncovered, eleven days spent in tracking seemingly fruitless clues. Was this to join the legion of unsolved crimes ? Inspector Cornish refused to pigeon-hole the dossier as yet. He ordered a thorough re-examination of all the available material.

The trunk was gone through again. Robinson's offices were searched again.

Pertinacity had its reward. The duster found in the trunk, when carefully washed out, was seen to bear in one corner, faint but just decipherable, the word 'Greyhound'. The police hurried to Hammersmith. A maid at the hotel identified the duster, and—she shared her bedroom with Mrs. Robinson.

And in a waste-paper basket at Rochester Row there was found a tiny but significant object: a bloodstained match.

No doubt now remained in the Inspector's mind that Robinson had committed the murder. Whether he could prove it in a court of law, however, was another matter. But here the estate agent facilitated matters, for when taken again to the Yard he made the mistake that had hanged Maynard the rabbit-catcher—he made another, contradictory, statement. He assumed that the police could prove all that they suspected, and told a story admitting most of the facts, but showing the woman's death to be accidental. 'I met that woman at Victoria and took her to my offices, and I want to tell you all about it. I done it and cut her up.' In detail he told how on the afternoon of the 4th he had gone out to buy stamps, how Mrs. Bonati had accosted him, and how he had taken her back to his office. There she demanded money. He said he had none, and she bent down as though to pick up something from the fireplace and went for him. 'I hit her on the face. She fell backwards; she struck a chair in falling. As she fell she sort of sat down and rolled over with her head in the fireplace. I left her there. . . . I returned to my office the following morning. I was surprised to find she was still there. She was dead. . . . I was in a hopeless position then. I didn't know what to do. I sat down and decided to cut the body up in pieces and cart it away in parcels. I . . . cut off her arms and legs. . . . I finished the job as quickly as I could before dinner. I then went to a public-house and had a drink.' His nerve then failed him, he said, and he found he could do no more dissecting. The next day he bought the trunk and conveyed the remains to Charing Cross in the way the police already knew.

* * * * *

Robinson was charged with murder and took his trial before Mr. Justice Swift on 11 July, being defended by Mr. Laurence Vine, Mr. M. D. Lyon, and Mr. A. E. McCloskey. For the prosecution were Mr. Percival Clarke, Mr. G. D. Roberts, and Mr. Christmas Humphreys.

It was a hard-fought trial. The really illuminating feature of the case—the remarkable detective work that preceded the arrest—was well reflected in the Crown evidence. No fewer than twenty-seven witnesses were called, most of them spending but a minute in the witness-box, but furnishing one of the links in the chain that Inspector Cornish and his men had so laboriously forged. The first witness, Davis the shoeblack, was followed by the porter who had received the trunk and the porter who had received the ticket from Davis. The dead woman's husband was called to identify the body; the Brixton-Road trunk-dealer was called to prove the sale of the trunk, and his daughter to describe the labels on it; a bus-conductor was called to describe how a man took a trunk on his bus from Brixton Road to Rochester Row; a man was called who had met Robinson in a public-house and who had helped him carry the trunk downstairs from his office to the hallway: ('I believe you are travelling in lead', this man had said jocularly when he lifted the trunk); Sharpington, the taxi-man, was called, and the man from the Royal Automobile Club was called to fix the time of the taxi-journey; the victim's landlady was called, and so were the prisoner's two landladies, the one whose house he had left on the 10th and the other who had taken him in after the 13th; even the Chelsea relieving officer was called. They called the clerk to the Rochester Row solicitor, and the typist Robinson had employed, and a man who had sold Robinson the knife with which he had done the dismembering.

As the case turned out, the evidence of all these people mattered not one whit, for the prisoner went into the box and admitted all that they proved.

There were two classes of witness, however, whose evidence was challenged. These were the police and the medical experts. At first it was thought that the defence would repudiate the prisoner's second statement, and there was speculation as to whether in that event he would give evidence and, if he did, as to what he would say. A determined effort was made in the police court to have this statement excluded, and when the detective-sergeant who had taken Robinson to the Yard on the second occasion was in the witness-box, Mr. Vine questioned him in a manner clearly foreshadowing an application to have the statement declared inadmissible in evidence. He put it to the officer that Robinson had been cajoled into admitting his connexion with the death, that the sergeant had urged him to confess, saying, 'I don't believe you did it, you ought to make a statement; come on, tell me, you're

not the kind of man to do a thing like that—that's why I want you to make a statement to justify yourself'. The sergeant strenuously repelled this allegation. Now, by the law of England any confession made following inducements of that kind cannot be used, and the lawyers in court were expecting to hear an objection when the statement came to be read. The moment came, and, as was anticipated, Mr. Vine rose and said :

' My Lord, this is the statement to the admissibility of which I objected at the court below.'

' Are you going to object here ? '

To the Court's surprise, counsel replied :

' No, my Lord ; but I would like to tell your Lordship the reason why I am not objecting.'

Swift stopped him. What better reason could there be, he inquired, for not objecting than—not objecting ?

So the statement was read, and the jury never learnt why it was that Mr. Vine abandoned that line of defence. (In point of fact he had objected in the police court primarily because the prosecution had refused to let him see the statement before opening their case, and the late Sir Henry Curtis Bennett, K.C., had advised him to abandon the point.)

The prisoner, after that, was committed to the defence put forward in this statement—that he struck the woman in self-defence. Clearly he would have to go into the box now. Meanwhile there was the medical evidence.

Three doctors were called by the Crown. The last was Sir Bernard Spilsbury.

In his calm, even voice the Home Office pathologist told the court what he found when he examined the body on the day after it had been taken from the cloakroom. There were a great many heavy bruises, he said, and the signs of asphyxiation. Mr. Percival Clarke read the prisoner's account of the scene in the office and asked, ' Do you accept that as a true explanation of her injuries ? '

' No,' said Sir Bernard.

He added that the bruises had been caused shortly before death : ' Death in my opinion was due to suffocation brought about by the covering over of the mouth and nostrils, and after the woman had been violently assaulted.'

Mr. Vine, conducting his first murder defence, battled valiantly against that dispassionate evidence, so fatal to his client. But Sir Bernard's careful examination, his outstanding skill, his unrivalled experience—and, be it added, his familiarity of long standing with the witness-box—these were proof against cross-examination. Minute after tense minute passed, as

counsel pressed pathologist with this and that symptom and its meaning, explored the effect of alcohol, suggested epilepsy, put it that the suffocation might be caused by falling on to a rucked-up carpet. . . .

Sir Bernard Spilsbury was not shaken, and when he resumed his seat in the well of the court the fate of Robinson was sealed.

On the afternoon of the second day the wretched man went into the box and told his story of the fight and the blow and his leaving the woman unconscious and the horrible method he adopted the next day to rid himself of the body. Why, he was asked, had he not gone instead to the police station opposite?

'I was in a blue funk,' he said.

Swift had followed the medical evidence with particular attention, and his summing up revealed how deeply it had impressed him. 'If you accept the testimony of those experienced pathologists, can you come (it is entirely a matter for you) to any other conclusion than that the prosecution have made out their case, that this man, having taken that woman to his rooms for an immoral purpose, having failed to acquire the gratification which he desired, first of all knocked her down and then suffocated her? That is the case for the prosecution, and the case for the defence is, that he struck her in self-defence.' There was the crux of the case, disentangled from the sea of verbiage and starkly put before the ten men and two women constituting the jury.

It was a long summing-up, lengthy largely because of the judge's care to warn the jury against matters that must not influence them. Many of the passages that had become common form in the judge's murder summings-up were present: the 'responsible to their own conscience' passage; the 'disregard the newspapers' passage; the 'facts for the jury alone' passage. The Woolmington misdirection[1] was here too. And because his sensitive mind had been affected by the horror of the case—he had had the trunk removed from court at the earliest opportunity, being unable to tolerate its presence in his sight—he took pains to warn them lest this influence warp their judgement.

Thirteen minutes over the hour the members of the jury deliberated. No one, least of all the prisoner, seemed surprised at their verdict: Guilty.

Robinson had nothing to say before sentence. He appealed, but his appeal failed, and he was hanged on 12 August at Pentonville Prison.

One feature of the Robinson case was the manner in which

[1] See pp. 230 et seq., *post*.

the police induced the prisoner to accompany them to the Yard. They had said, 'We are police officers: you must come to New Scotland Yard'. An invitation in that form could hardly be declined; yet it was in law only an invitation, for the police could not compel him to go with them unless they arrested him. He was not arrested, and therefore there was —as Mr. Vine elicited—no necessity to comply with the police rule that 'a man under detention has the right to have a solicitor or friend present while he is being interrogated'. Swift saw nothing wrong in this, and said so, and on a common-sense view of the matter he was right; for the police would lose no small part of their efficiency if they were not at times able to add the suasion of the blue uniform to the powers conferred on them by law. This does not indicate that Swift always backed up the police, right or wrong—the contrary was the case, as many an officer who has smarted under the lash of some barbed reprimand could declare with vehemence. 'He was always courteous to jurors and witnesses, but rarely so to police and counsel.' That was said to me by a barrister. The second branch of the assertion is not true, of course; but it can by its exaggeration serve to point Swift's critical attitude to those with a duty to perform. Whether they were counsel, police, or expert witnesses, they found it advisable to disclose no mishandling of their job when in his court. Another of his Old Bailey cases affords a striking illustration of this. This was the Zoo murder.

In the small hours of the morning of Saturday 25 August 1928, a constable on duty in the Outer Circle, Regent's Park, heard groans on the other side of the wall bounding the Zoological Gardens. He climbed the wall and found a dark-skinned young man lying in agony outside the Tapir House. A Zoo official soon identified him as San Dwe, a mahout, who had come to England as guardian of a sacred Burmese white elephant. He had injured his foot and was plainly hysterical, and the rescuers, mystified as to what had occurred, went up to the room he shared with another elephant-trainer, an Indian named Said Ali. The room was over the Tapir House, and it seemed as though San Dwe had fallen from its window.

In the room they found Said Ali lying in bed in a pool of blood. His head was horribly wounded and he was dying. The room was in confusion and a bloodstained sledge-hammer lay in a corner.

San Dwe was taken to hospital and later in the day to the police station. He was still excited—'Me no kill Said Ali!

THREE FRIENDS

LEFT TO RIGHT: *Swift, Lord Fairfield (then Lord Justice Greer) and Sir Ernest Wild (Recorder of London) : September* 1932

Me no fight Said Ali!' he cried repeatedly. Later he calmed down sufficiently to tell his tale. In broken English he related a remarkable story: 'I was awakened by a light. . . . Said Ali said, "Who are you?" They then hit Said Ali, and I rolled off the bed underneath, and I heard Said Ali's noise very big. . . . I heard a noise of beating. . . . I remember I keep one window open, and I jump out of the window. . . . I call out and a policeman come. I saw two lights, but I think three or four men. . . . I don't like Said Ali. I play my music and Said Ali do not like it. I want to see my friends.'

Further inquiries were made. San Dwe was given the character at the Zoo of being a kindly and obliging boy—he was only twenty-two—with a fondness for playing his native pipes. Said Ali, it seemed, used to train the elephants on which the children rode. He made a substantial income in addition to his wages from the pennies that the children gave the elephants, and was well enough off to travel back to his native Calcutta each winter. Concrete evidence of his affluence was afforded when there were found hidden in his room two bags of coppers, £36 10*s*. in notes, and a bank book showing £60 on the credit side.

Later a friend called to see San Dwe at the police station, and the police took down in shorthand what was said to this visitor. San Dwe now told in a rambling fashion of a discussion with some man, whom he did not identify, of his (San Dwe's) desire to return to Burma. But he hadn't the money, he said. The man urged him to steal Said Ali's money. 'I said, "If I do that he will lock me up". He said, "Keep the door open and I will come Thursday or Friday night".' On Friday night the man came. 'He hit Said Ali three times and asked for the key. There were two men. The other man took the key and try to open the box. . . . If I go out he stop me, so I jump out of the window.'

The elephant-boy was kept at the police station, and on the Sunday evening, 26 August, he was charged with murder. He came before Swift in the following November. The prosecution claimed that this murder—for murder it undoubtedly was—had been committed by some person or persons from the motive of robbery. San Dwe was admittedly present at the time, and witnesses were called to say that no strangers had been seen in the grounds that night. It was submitted that the boy's guilt was the reasonable inference to draw from the facts, and that his statements were clumsy attempts at exculpation, their inconsistencies lending weight to the Crown case. Sir Henry Curtis-Bennett, K.C., de-

fending, took the rare course of calling no evidence and submitting that the prosecution had not proved their case. He pointed out that the dead man and the prisoner had lived on the friendliest of terms, and that nothing was in fact stolen. The evidence was purely circumstantial. San Dwe had been described when found outside the Tapir House as 'terror-stricken, foaming at the mouth like a demented madman'.

San Dwe was found guilty. The death-sentence was later commuted to penal servitude for life.

The police conduct which had angered Swift in this case was their keeping San Dwe detained at the station while making inquiries. He went out of his way to condemn this in his summing-up. By doing so, he said, they took the risk of an action for false imprisonment, and if an action were brought against them he did not know what defence they would have. 'Apparently the officer in charge of the case did not know whether the law justified such detention and did not care. He was prepared to take the risk.'

* * * * *

Swift did not dislike the Central Criminal Court. Always more at home with commerce than with Society, he was stimulated by the practical air of the City of London, and he enjoyed the company of the aldermen and other City dignitaries whom he met at the Sheriffs' daily luncheons. Especially was he glad to see at that table his old friend Sir Ernest Wild, the Recorder of London: Wild and he had continued their parallel careers in the years following their joint appearance in the Chesterton case and had reached the Bench within two years of one another. But he cannot have greatly enjoyed one of the typically 'City' cases he tried, involving as it did the unravelling of as complicated a financial tangle as has ever been before the courts. This was the trial of Francis Lorang, a case representing Swift's share in the aftermath of the 1929–30 financial panic: just as it fell to his brother Avory to write finis to the Hatry crash and to his brother Wright to try the Royal Mail case, so it was Swift's task to preside over the sequel to the Blue Bird scandals.

Many hundreds of small investors had been ruined in the failure of the Blue Bird petrol companies in 1929, and as a sequel Lorang, the moving spirit behind them, in the following year took his stand in the Old Bailey dock to answer an indictment containing no fewer than thirty-four counts. The principal charges were that he fraudulently, and while a director of Blue Bird Petrol Ltd., Blue Bird Oil Importers

Ltd., Blue Bird Oil (Foreign) Ltd., and Blue Bird Holdings Ltd., took and applied for his own use or for purposes other than those of the Companies, the sum of £69,898, and other sums. He was also charged with issuing as director of Blue Bird Petrol Ltd. a false statutory report of the company contrary to Section 84 of the Larceny Act 1861—the same section that caused the legal controversy in Lord Kylsant's trial.

From the outset Swift took especial pains to disentangle the complex monetary transaction involved. He knew how easy it was for a jury to become hopelessly lost in the morass of figures into which such cases sometimes degenerate. 'It is very difficult,' he told them, while a bank official was giving evidence, 'to follow what these things mean and what they amount to, but it will all boil down to whether in dealing with these various large sums of money Lorang was dealing honestly or fraudulently.' Several times he summed up to the jury the purport of a witness's evidence, and explained the purport of the cross-examination, and once, after inviting an explanation of one transaction from both prosecuting counsel, he observed drily to the witness, 'I don't think either of the learned counsel knows what it means, do you?'

It was not until the sixth day of the trial that the closing scenes were reached. The judge took especial care with his summing up. Even upon so arid a theme he contrived to hold the jury's attention with flashes of his wonted wit—as when he observed that a company could no more buy its own shares than a dog could live by eating its own tail. The prisoner was found guilty on every count in the indictment and was sentenced to seven years' penal servitude.

* * * * *

Another of the judge's well-known Central Criminal Court cases was the eight-day trial of the leaders of the Communist party for sedition. But they deserve a chapter to themselves.

CHAPTER SIXTEEN

THE COMMUNISTS

Rigby Swift was the bewigged puppet chosen to put the Communist leaders away in 1925.—DAILY WORKER.

JUDGES invariably dislike political trials. More than any other class of case they tend to convert what should be a calm, fact-finding tribunal into an arena for the airing of prejudice and the loosing of passion and bitterness. No trials are more open to public misunderstanding : in a prosecution for murder, for instance, the newspaper-reading public can see quite clearly and discuss dispassionately what the issue is, whereas a political case, inevitably viewed through spectacles of varied hues, is distorted in the telling, and becomes confused and clogged with all manner of irrelevant considerations. No one reading day-by-day accounts of the Robinson case could have had any doubt what the jury were trying—namely, whether or not the prisoner murdered Mrs. Bonati ; but people following the Communist case must have felt that the safety of the British Empire, the right to free speech, the duties of the police and the rights of governments all hung in some mysterious way upon the trial. Yet these were mere by-products distilled in the heat it engendered, and the jury were concerned with none of them. The real issue was short and simple.

But it required an able judge on the one hand to keep that issue disentangled from all the alien strands entwined with it, and on the other hand not, by suppressing irrelevancies, to give an impression of harshness. The confusion into which such cases may fall in the hands of an easy-going judge is instanced by the fiasco of the Pemberton–Billing libel case (tried by Darling), while the perils awaiting a strong judge will be appreciated when it is remembered how McCardie's judgement in the Amritsar libel suit led to the suggestion in Parliament that he be removed from the Bench.

Strength and impartiality Swift had, and another quality of great importance in this case—a genial *cameraderie* well calculated to reconcile to English justice men coming into a dock convinced that their trial will be biased and the court hostile. Another essential attribute is happily so taken for granted

nowadays in the High Court Bench that it is apt to be overlooked. That is incorruptibility. Swift was impervious to backstairs pressure, whether political or of any other variety, and nothing infuriated him more than attempts to influence his decisions. Once, in a circuit town that shall be nameless, an influential local magnate and M.P., now dead, called upon him. The visitor was a large landowner, and would no doubt be considered by those who do consider such matters to be the social superior of the judge. He commenced to talk about a prisoner awaiting trial at the Assizes. Swift cut him short: 'You may give evidence in open court, if it is relevant, but I am not going to listen to anything here. Marshal! Show this gentleman out!'

The Communist trial commenced on 16 December 1925. Twelve members of the Communist party of Great Britain, among them Walter Hannington, Harry Pollitt, William Gallacher, and J. R. Campbell, were charged with conspiracy to publish seditious libels and to seduce members of His Majesty's forces from their duty, and to incite to mutiny. The Attorney-General, Sir Douglas Hogg, K.C. (afterwards Lord Hailsham, Lord Chancellor), prosecuted. With him were Sir Travers Humphreys (now Mr. Justice Humphreys), Mr. (afterwards Sir) Percival Clarke, and Mr. H. M. Giveen. For seven of the accused Sir Henry Slesser, K.C. (now Lord Justice Slesser), and Mr. Arthur Henderson appeared, and Mr. W. M. R. Pringle represented a further two. Pollitt, Campbell, and Gallacher conducted their own defence.

The Attorney-General in his opening said that the Crown case was that the defendants were the heads of an organization calling itself the Communist Party of Great Britain, and that this was an illegal organization, its illegality lying in its object being the overthrow by arms of the present state of society and, as a means to that end, the seduction from their allegiance of the armed forces of the Crown.

The principal evidence consisted of literature seized by the police in raids of the party's premises, and found in the possession of the defendants. It would be tedious to summarize the contents of these documents, but the issue before the jury was the simple one: were they seditious or were they not? Mr. Attorney on the one hand and Sir Henry Slesser on the other addressed long and learned arguments to the jury upon this topic. The defendants who were not represented, however, embarked upon a wider field of discussion. Swift gave them ample liberty. 'You go ahead with your questions,' he told them, 'and if I tap with my pencil on the desk you

will know you have gone off the rails.' He gave them considerably more latitude than he would give an ordinary defendant, though he pulled them up when necessary.

Gallacher's cross-examination of a detective-sergeant elicited the following account of surprising events at a Communist conference.

'Did you and another officer hide beneath the platform?'—'We engaged a room directly beneath that in which the meeting was held. To obtain access to us you and your fellow-Communists forcibly wrenched a trap-door open.'

'Your ear was to the trap-door?'—'Yes.'

'You and your colleagues smashed the trap-door and we called the police and gave you in charge?'—'That is quite incorrect.'

'You were taken to Bow Street in custody?'—'That is incorrect. A young officer was called who did not quite understand the position, and we offered to go with him.'

'We got possession of two official notebooks as a result of your throwing them away in a panic?'—'Yes, we anticipated they would be taken from us by force, and we threw them through the skylight of a locked room from which they were stolen by the Communists.'

Pollitt in addressing the jury said that this was the most important political trial for sixty years. They were being prosecuted because a reactionary Government was using its temporary power for the purpose of suppressing political ideas hostile to its own. He would produce, he said, seditious speeches by Lord Birkenhead, Lord Carson, and Sir William Joynson-Hicks, the then Home Secretary.

Swift: 'No. I can't give you permission to do that. I don't see how seditious speeches by them can be of the slightest assistance to the jury or have anything to do with this case. You could have preferred a bill of indictment against them if you had wished to do so. We cannot have their seditions mixed up with yours!'

Amid the ensuing laughter Pollitt retorted, 'When we are members of the Government we will satisfy you that action shall be taken!'

That was a retort after the judge's own heart, and it is pleasant to be able to record that the defendants felt, or at any rate appeared to feel, that the trial was being fairly conducted. One of the accused, Wal Hannington, has given an account of the trial in his *Unemployed Struggles* (1936). He has no criticism of the proceedings save that contained in the words, 'The summing up of the judge, Rigby Swift,

was nothing short of a clear direction to the jury to find us guilty.'

At the close of his long and able—though from the legal standpoint largely irrelevant—exposition of the theory and aims of Communism, Pollitt expressly thanked Swift for the latitude he had been allowed.

The trial began on a Monday, and it was not until the Wednesday of the following week that the judge came to sum up. He at once urged upon the jury the necessity of discarding all prejudice: 'You must dismiss from your minds the suggestion that the prosecution has been instituted by one political party against another. If the evidence proves the defendants guilty, it does not matter how low the motives of those who brought the case forward; if they are not guilty, it matters not how high and patriotic those motives may have been.'

He then turned to the narrow issue of the trial. The jury would have little doubt that the prisoners were working together in agreement. But to justify a verdict on a charge of conspiracy there had to be not only an agreement, but an agreement to do something which was wrong. Here was the core of the case: did the documents disclose something wrong, something seditious? The judge gave them three tests to apply: Was the object of the documents to lead to civil war? Did the language used imply that it was lawful and commendable to employ physical force in any manner or form against the Government? Did the language used tend to subvert the Government and the laws of the Empire?

Swift was not given to oratory on the Bench; his addresses to the jury seemed like a quiet (though always audible) talk by one man to another. On this occasion, however, he departed from his tradition sufficiently to close with a peroration of some eloquence, deserving of being printed in full. He said:

'Since our history as a nation began, this country has been singularly free from treason, insurrection, tumult, and sedition. From time to time these things have occurred, and will occur again. It will be a bad day for the country if when such things occur the Government is not strong enough to bring those suspected of them before a court of law, and it will indeed be a bad day for the country if when sedition has been proved to have occurred there is the slightest faltering either on the part of the jury or the judge in putting down the offence. If the evidence before you satisfies your consciences that the men are guilty, you must not hesitate to

find them guilty; if it does not satisfy you, you must not be afraid to say not guilty.'

After a twenty-minutes' retirement all the accused were found guilty on all the charges. Swift sentenced the five men who had had prior convictions for similar offences to twelve months' imprisonment in the second division. The remaining seven he offered to bind over if they would promise to have nothing more to do with this association or the doctrines it preached. Not unnaturally they refused to give such a promise, and were then given six months' imprisonment.

* * * * *

There was a certain amount of agitation during the trial by adherents of the twelve defendants, and upon occasion attempts to ' demonstrate ' in court led to summary ejectments. On the Saturday of the trial a serious threatening letter arrived at the Old Bailey, threatening that Swift would be ' done in ' if he continued to sit. Judges frequently receive anonymous communications of this nature, and of course pay no heed to them; Scotland Yard, however, thought this one worthy of some respect, and they detailed two C.I.D. men to escort the judge on his daily journey between Cannon Street Station and Newgate Street. This was a kind of attention that Swift cordially detested, and on one morning he went to the length of travelling by an early train in order to give his protectors the slip. The officers later arrived at the court with the news that he was not on the train, and were surprised to hear that he had been in the building for some time.

After the verdict and sentence a further howl went up from Left-Wing quarters. It is perhaps not surprising that members of a party which had been declared illegal by the verdict of the jury should seek to make capital out of the spectacle of an ex-Tory M.P. sitting in judgement upon Communists and offering them liberty at the price of apostacy—for such was their interpretation of his generous offer to bind the men over. No doubt he would have been wiser not to have made it, for he might have known that they would refuse; on the other hand he always hated sending people to prison, but he could hardly bind these men over without imposing a condition that they would refrain from activities found by twelve jurors to be seditious. It was an instance where his generosity outran his discretion.

Not that Swift cared twopence what Communists or anyone else thought about him, not even when he was attacked by people who ought to have known better—and he was thus

attacked. Mr. (now Sir) Walter Citrine, for instance, said, 'In my view a most unsuitable judge was selected,' and Col. Wedgwood, M.P., said, 'I think the sentences are perfectly iniquitous. The judge's summing-up was extremely biased.' Worse than this mere vituperation was the suggestion made by Mr. Ramsay MacDonald in the House. Referring to a speech made by the Home Secretary on the eve of the trial, in which Sir William Joynson-Hicks was alleged to have forecast the conviction of the defendants, Mr. MacDonald asked, 'How did he know? Was he in touch with the judge?'

That was an unfortunate statement to come from an ex-Prime Minister, explainable perhaps, but not excusable, by the heat of debate. It hardly needed a negative answer. It should be added that 'Jix' also denied having made the forecast alleged against him.

Perhaps it is difficult for the layman to realize the difference between Swift M.P. and Swift J. The plain fact is that when a barrister who has been a party politician ascends to the Bench he sheds his politics completely. This is an honourable tradition of the English Bench, and has been followed for many generations, and no one in touch with the judiciary will have any doubt that it is faithfully observed. It is a pity that some of those farther removed from the courts cannot bring themselves to believe in the political disinterestedness of the Bench.

This is not to say that political trials should never be criticized. By all means let there be criticisms of the law of sedition and let there be attacks upon the policy of the prosecution, but once a prosecution is started, and the law being what it is, the man entrusted with the task of seeing the law applied ought to be immune from personal attack.

Legitimate criticism of the trial there was in plenty, culminating in a vote of censure on the Government, when the Opposition moved that the prosecution was a 'violation of the traditional British rights of freedom of speech and publication of opinion'. The motion was lost by 251 votes to 127; Sir John Simon abstained from voting because, although he was satisfied with the conduct of the case and the justice of the decision, he was doubtful as to the policy of the prosecution. There will be many who will share Sir John's opinion.

The Communist trial had an unexpected sequel in 1930, at a time when Ramsay MacDonald's second Labour administration was in power. At Winchester Summer Assizes that year, Swift had before him a man charged with distributing pamphlets to soldiers at Aldershot inciting them to mutiny.

It appeared in evidence that the leaflets urged the men not to go to India to shoot Indian workers. The defendant was convicted, and sentenced to eighteen months' imprisonment.

The organ of the Communist party, the *Daily Worker*, took exception to this prosecution and sentence, and on Tuesday, 8 July, printed the following comment upon it:—

'These long and vicious sentences mark a new development of that violent oppression of the working class which is rapidly becoming the hall-mark of the Labour Government. The leaders of the Labour Party take good pains to select their most trusted creatures to carry through these repressive measures.

'Rigby Swift, the judge who sentenced Comrade Thomas, was the bewigged puppet and former Tory M.P. chosen to put the Communist leaders away in 1925.

'The defending counsel, able as he was, could not do much in the face of the strong class bias of the judge and jury.'

This was felt by the Government to be a little intemperate, even for the *Daily Worker*, and on the following Friday, Sir William Jowett, K.C., the Attorney-General, applied to the Lord Chief Justice for a rule nisi calling upon certain persons connected with the printing and publishing of that paper to show cause why they should not be committed for contempt of court. The application was granted.

Four days later three of the partners in the Workers' Press (publishers of the paper), Frank Priestley, Frank Paterson, and F. Brennan Ward, appeared, with W. T. Wilkinson, the managing director of Utopia Press, Ltd., the printers, before the Lord Chief Justice and Talbot and MacNaghten JJ.

The printer, Wilkinson, put in an apology, but the other three respondents were not in so contrite a mood. They proposed, they told the astonished court, to justify what they had said about Swift. Whereupon the three judges were forced to listen with at least an outward show of patience to an amazing series of declamations.

'The whole legal system of capitalism is based upon class bias, and demands such men as Rigby Swift to conceal the reality of the capitalist dictatorship behind so-called legal terms.' Thus Comrade Priestley. He was followed by Comrade Brennan Ward, who seemed particularly annoyed that these proceedings were taken by the Labour Government. It was because, he said, the *Daily Worker* had attacked the policy of Fascist violence of the Labour Party that this

charge had been made and that the Labour Government had flown to protect the reputation of Mr. Justice Swift.

Paterson, when his turn came, cited the contemporary Labour critics of the 1925 trial, and cried: 'Rigby Swift is a puppet of the ruling class—as are all the judges in this country. Every section of the State—Parliament, the judiciary, the Church, and the armed forces—are used in order to suppress the working class.

'The *Daily Worker* has spoken the truth, and I stand by every word of it! Hands off the *Daily Worker*! Down with the Labour Government!'

Having listened to the Attorney-General, and to Mr. Croom-Johnson, K.C. (as he then was), for the printer, Lord Hewart announced the court's decision. The publication he characterized as a gross and outrageous contempt; the speeches of the three publishers had aggravated that contempt. The printer would be fined £250 and £25 costs; Priestley would be imprisoned for nine months, Paterson for six and Ward for five.

Upon hearing his sentence Comrade Priestley leapt to his feet, and in tones not often heard in that court informed the Lord Chief Justice that the Communist movement would go forward 'until you and all you represent are swept into the dust-heap of oblivion'.

* * * * *

Comment upon the above proceedings does not seem to be called for. Swift's memory needs no clearing from aspersions bearing so plainly upon their face the emblems of their true character.

CHAPTER SEVENTEEN

ANNUS MIRABILIS

'I am above all things an early Victorian.'

THE *Daily Worker* contempt case was heard before three justices of the King's Bench sitting in the Divisional Court. This is one of the many courts in which such judges find themselves—for the King's Bench puisne judges are the judicial maids-of-all-work. They try civil actions in the Law Courts in London, they carry peripatetic justice throughout the shires, they sit at the Old Bailey, they staff the Court of Criminal Appeal, in times of stress they are lent to other courts, and they have odd jobs innumerable thrust upon them. They are fair game for committees, and often when Parliament creates some new judicial machinery it draws upon the King's Bench reservoir for a judge; in this way the judges have become the supervisors of elections and the presidents of inquiries (such as that into the Budget leakage of 1936), while one of their number is contributed regularly to the Railway and Canal Commission.

This catholicity of work is strikingly evident in Swift's most crowded year—1929. He was then fifty-five years of age, and in his prime both as a judge and as a man. In that year he went two circuits, visiting eight busy towns. He took a session at the Central Criminal Court; he spent some of his time at the Law Courts trying civil cases and some part of it sitting in the Divisional Court to hear appeals from magistrates; he was lent for a period to the divorce division; he was election judge and journeyed to Devonshire to try a complicated election petition. Besides all this he found time to serve as President of the Lancastrians Association, and in the Long Vacation to render an outstanding service to the nation by helping to settle far-reaching industrial strife.

* * * * *

Swift started the year trying civil cases with juries in London, and on 11 February went north to take the Winter Assizes at Newcastle, Durham, York and Leeds. It was the coldest circuit he ever went. At Durham the roads were impassable with frost and snow, and when the judicial party

came to leave for York, it was found that the lorry detailed to collect the baggage could not ascend the hill to the castle; eventually three horses succeeded where a petrol engine had failed. At the opening of Newcastle Assizes the horses drawing the sheriff's glass coach had great difficulty in ascending the icy road to the shire hall. 'I shall get out,' said Swift. The officials were shocked, and reminded him of his judicial dignity. 'Dignity consists in doing the right thing at the right time,' answered the judge, and he got out and walked up the hill in his robes beside the coach.

On this Assize Swift found himself in the usual demand as an after-dinner speaker. With his broad wit, his sympathetic approach, and his practice in public speaking he naturally excelled in that type of speech that goes so well after dinner, and now he took the opportunity of these occasions to develop a theme which should be borne in mind when one comes to discuss his relations with the Bar.

For by this time it was beginning to be said by a few people that Swift was unfair in his treatment of some advocates. It was suggested that he was more stern than necessary when a slight slip had been made, that in some instances he put questions to counsel with no other object than exposing the latter's ignorance, that occasionally he was intolerant of inexperience. They never talked like this of Swift on the Northern Circuit, where they understood him, but in other parts of the country these murmurs did arise, and they became increasingly audible later on towards the end of his life. The short answer to them was that the judge was trying to help. Swift the advocate became Swift the judge in 1920, but the judge never completely submerged the advocate, and to the end of his days he retained an abiding interest in the art of advocacy. Because slovenly advocacy irritated him, he was anxious to point out to those appearing before him where their errors lay, and it was the manner of his doing this that caused the occasional murmurs. But whatever his defects of method, his motive cannot be questioned; what brought forth his reproofs was his desire to see the lamps of advocacy kept brightly burning. 'I think the one thing you want in legal education is a school of advocacy,' he told one of these North-country gatherings in 1929. Young lawyers, he said at a similar dinner, were taught about contracts, torts, real property—even how to understand Lord Birkenhead's Acts (laughter)—'Yet I have never heard of anybody teaching the laws of advocacy'. He was in rare vein that night, and continued, 'Law students should be taught how to stand up, how to speak

up, how to dry up, and how to shut up'—especially the last: 'I have heard a man drying up for half an hour, but I have been very much more impressed with the man who shut up in half a minute!'

That was Rigby Swift at his merriest. He was more serious at the Yorkshire Law Society's dinner on 28 February, and he delivered himself of what may stand as his apologia for the line he took. 'There are so many things that young men do when they come before me that annoy me and irritate me. I have to say, "Would you mind standing up, speaking up, and taking your hands out of your pockets?" because nobody has ever taught them these things. You do not know it by instinct. I dare say your advocates are born; so are all of us—but we had to be taught the right way to walk about, and I cannot see why law students should not be taught what I regard as the essentials: how to conduct yourself when you get into a court of law. That is why, when anybody outside takes any notice of me, they say I am letting down the Bar. I assure you I am not. I am doing my best to make a better Bar.'

* * * * *

These words were spoken on the evening of the first day of a trial that caused the greatest interest in Yorkshire, and even led to an outbreak of public hysteria in Beverley, the town of its origin. The interest is understandable, for 'the Westwood crime' (as it came to be known) sprang, according to the prosecution case, from the most elemental of human passions, while all the pity one feels for little children could fasten upon the eight-year-old victim of this murderous assault.

The story of this crime commenced at 6.30 p.m. on the 15th of the previous November, when a Mrs. Slator hurried into the police station at Beverley saying, 'Has there been an accident?' The officer on duty had heard of none, when Mrs. Slator explained that at 5.40 she had sent her step-daughter, Jean, on an errand to a near-by shop, and that the girl had not returned. 'There are all sorts of men about, who might interfere with her,' she added.

The police are always receiving false alarms about missing persons, and this policeman somewhat pardonably did not attach much gravity to a girl's absence from home for fifty minutes. At ten o'clock, however, the woman was back. The child was still missing. The constable took particulars, and suggested she might have visited the pictures. Mrs. Slator went off to inquire at cinemas. Meanwhile the police were active, and soon afterwards Superintendent Huddlestone

arrived to direct inquiries. At midnight there was still no trace of the child, and the superintendent determined to search the Westwood, a piece of common close to the Slators' home. Twelve officers began the search in extended order and with the light of torches. Slowly they moved across the grass on their tedious and probably fruitless task. One o'clock came, and nothing had been found. On went the search, slow, methodical, regular, missing no inch of ground. Two o'clock came, and still no result.

Then, at five minutes past two, a south went up. A sergeant had come across the little girl, lying crouched up in a hollow. There was blood all around, and her face was not a pleasant sight. Was she alive? They quickly felt her heart: yes, it was feebly beating. They wrapped her in a policeman's coat and carried her to her home. When they washed her they found a piece of string and a bootlace wound round her neck. She was taken to hospital, and was found to have been battered about the face and head by some blunt instrument; providentially the skull was not fractured.

Meanwhile Supt. Huddlestone was looking closely at the scene. Some illuminating objects were found there. There was a half-brick which appeared to have blood on it, and there was the imprint of a heel in a patch of cowdung. A cast was taken of that heel-print, and the brick was carefully removed.

Next day public indignation mounted as the story became known. The police heard some remarkable tales from various people who were later to be witnesses at the trial, and on the 19th—four days after the crime—they discovered the place from which, so they thought, the brick with which the girl had undoubtedly been struck had come. With that clue in their hands they might have made an arrest. But they did not, and it may be conjectured from the subsequent evidence that they were waiting to see whether Jean, when she recovered, could remember anything helpful.

For another nine days they waited. On 28 November Mrs. Slator, the stepmother, was arrested.

Gossip and fertile rumour had been flying through Beverley, and after the arrest feeling reached fever heat. The Westwood case became the sole topic of discussion for many miles around; a great deal of unreasoning prejudice was displayed, and there was a disgraceful outbreak of hissing and booing in the police court when the prisoner appeared before the magistrates.

The trial came on at York on the last day of February. The most grave of the four counts in the indictment charged

the prisoner with wounding with intent to murder. The prosecution had therefore a double task, that of proving a fact—the wounding—and that of proving a state of mind—the intent to murder. They commenced with the second task, and the greater part of the first day was occupied in calling evidence intended to establish a systematic course of cruelty to the child over a long period. Neighbour followed neighbour into the box to say that Mrs. Slator had, since her marriage in 1927 to Jean's father, continually complained of the child's destructiveness, untruthfulness, and intractability, and had had to resort to many forms of punishment to subdue her. She had, they said, locked her in a cupboard, darkened her bedroom, beaten her, on one occasion causing a cut and swollen lip, and had once cut her hair irregularly and disfiguringly as a punishment. The child, once a bright girl, became timid, and 'seemed to shrink away as though expecting a blow'. In fact, as a Sunday School teacher said, 'It was common gossip that the mother was cruel to the child'. One neighbour gave evidence that Mrs. Slator, who was childless, had said she would like to have a child, but Jean would kill it.

A damning catalogue it sounded, but under the questioning of counsel for the defence, Mr. Streatfeild (now a K.C.), a sensible proportion of its effect evaporated. It became apparent that a good part of the 'common gossip', took its origin not from the child's appearance, but from the mother's loquacity. She was a garrulous woman; as her own counsel put it, she used ten words where one would do, and she seemed to have spoken not infrequently of the punishments she had been forced to inflict upon Jean. One of counsel's lines of cross-examination, however, got blocked by the judge. He had suggested to a school-mistress that she would, if she had thought Jean was badly treated, have informed the husband.

'Tell me,' interrupted Swift, with devastating effect: 'have you been in the world long enough to know that it is better not to go to a husband and complain about his wife?'

There was nothing improper in the calling of this line of evidence, of course. If the jury found that the prisoner's was the hand that dealt the blows, they would have to inquire further what design lay in her mind, and here was material from which they might perhaps deduce a wicked malevolence. But when, years afterwards, one reads dispassionately the shorthand note of this testimony, one does seem to catch a reflection from within the calm Assize court of those flames of popular hatred that had raged without.

Late in the afternoon the tempo changed, and the dark spirit of tragedy seemed to descend upon the court. The little victim herself was called. A pathetic figure, she was too young to be sworn. Mr. Lowenthal, K.C., who led for the Crown, questioned her. Yes, she remembered being hurt.

'Who was with you when you were hurt?'

In the stillness the child whispered her answer:

'Mother.'

But she remembered—mercifully, perhaps—very little of what had happened, and readily admitted, in answer to Streatfeild, that she had gone out alone to the shops that night, and remembered nothing after that. Swift very rightly told the jury to banish her evidence from their minds when considering their verdict.

The next day there came witnesses to the prisoner's actions on the evening of the tragedy. According to them Mrs. Slator found time while inquiring after Jean's whereabouts to dilate upon the child's evil nature. Judge and jury next heard how the child was found, and the doctor gave them his view that had she not been discovered before the next day, she would have died of exposure.

There remained the coping-stone of the Crown edifice, the evidence connecting Mrs. Slator with the crime, they said, as clearly as though some bystander had seen her hand rise and fall over the prostrate body. These mute witnesses were the footprint and the half-brick. A police-sergeant had taken a cast of the heel-print, and the county analyst explained how from the negative cast of the impression he made a positive. Shown a shoe taken from the prisoner's house after her arrest, he gave it as his opinion that the cast he had made was a cast of the heel of that very shoe. Furthermore, when given the shoe to examine microscopically, he had found a spot of blood on it. . . . The brick found on the scene also had human blood on it.

And that brick, that deadly brick—had the police not made their midnight search it might have taken two lives—had come from the top of a wall at the rear of the Slators' house.

Or such was the view of the inspector who had looked closely at the premises. He had seen there a short wall, with a row of loose bricks at the top. One brick was missing. But it had left an impression in the dust and mortar. *The Westwood brick exactly fitted that impression.*

The superintendent gave evidence. He added to the story the woman's exclamation when arrested: 'Oh, it is so cruel!

I must have an enemy somewhere. Has Jean spoken? I know she is very untruthful!'

'My Lord, I call the prisoner,' said Mr. Streatfeild on the third day.

Mrs. Slator's was a simple story. She had sent Jean shopping: she had gone to look for her, had discovered that she had not called at the shops, and so gone to the police. She had not harmed her; she knew nothing of the brick; she loved the child, though it had been untruthful and destructive and she had had to punish it. She joined issue with some of the Crown witnesses: it was a strap and not a stick she had been using when one of the witnesses saw her, and she had never said she wanted a child but Jean would kill it. She denied, too, the words attributed to her on arrest.

Under cross-examination she insisted that she loved Jean dearly, even though she had complained of her jealousy.

The third day was closing, and the lamps were lit, as Swift summed up. It was a formidable case that the prosecution had built up, and it was no less formidable when the judge had finished commenting upon it. He pointed with deadly force the effect of the evidence. Did the jury believe the story of the brick? Was it suspicious that the prisoner went round that night telling strangers as well as friends how untruthful and naughty the child was? Who else could have done the deed—the girl had not been interfered with, and who would batter her for the sake of the half-crown she had for shopping? Why did she ask 'Has Jean spoken?' when arrested? What did she think Jean had said that made her reply to Jean's unheard challenge 'I knew she was untruthful'? But they must be careful to avoid prejudice: if they thought she had treated the child with abominable cruelty, they might use this to supply motive, but they must not, in finding her a brutal woman, thereby assume her guilt. 'You must put out of your minds sympathy with the child.'

The jury deliberated for three-quarters of an hour and returned with a verdict of 'Guilty'.

'I am absolutely innocent,' declared Mrs. Slator.

But the judge did not think so. For once there was no mercy in his tones as he said: 'A more deliberate, cruel act I have seldom heard of, and the sentence of this court is that you be kept in penal servitude for fifteen years'.

The court was packed to suffocation with Beverley folk who had come over to York to see the trial, and at the judge's sentence their feelings at last gave way in a salvo of clapping

and cheering, and the police had difficulty in protecting the prisoner as they escorted her to the cells.

So far as I have been able to ascertain fifteen years, imposed here and in the Sinn-Fein case, was the heaviest penalty, other than the capital sentence, that Swift ever inflicted.

* * * * *

Back in London, Swift sat for a time in the Divisional Court. He rounded out the Trinity sittings by a visit to the Old Bailey and a spell as additional divorce judge, where he sat until the Long Vacation.

Lasting as it does from the end of July until the middle of October, the Long Vacation is aptly named. The majority of judges take advantage of it to remove themselves as far from the courts as possible. But Swift had no love of travel, and he had never acquired a taste for the conventional vacation pursuits, so while his judicial brethren were passing the time beside the Italian lakes or exterminating wild life in Scotland, he would usually be found at home at Crowborough sitting in the sun with his briar pipe and watching his racing pigeons, or busying himself with Lady Swift in the management of their little farm. His home and his farm were his hobby, though they were never a hobby that diverted attention from work; for his work was his passion, and whenever the call to work came he gladly answered it. He might be busy on the farm planning what came to be known as 'the pigs' palace' or the 'home of rest' he established for vagrant pigeons, but he could leave this without annoyance if a summons came. In truth he found the Long Vacation too long, and he was glad when it was shortened for a few years after 1932. He was accordingly delighted as well as gratified at the task which came his way in the Long Vacation of 1929. Early on the morning of Friday 16 August a telegram arrived at 'Kiona'. It was from Sir Horace Wilson, then of the Ministry of Labour. The cotton trade dispute, it said, had been settled by agreement to arbitration. Would Swift act as chairman of the board of arbitrators?

The prospect of rendering service to his beloved Lancashire warmed Swift's heart. He immediately telegraphed to the Lord Chancellor for permission to accept. Lord Sankey readily assented. 'Forgive my saying so,' he wrote, 'they could not have got a better man, and I think you are doing a great public service in undertaking the job.'

Swift's inquiry, as will be remembered, was into the wages of the cotton industry. For years cotton had been going from

bad to worse, and in 1929 the mill-owners declared they could not continue at the current rates of wages. Wages would be reduced, they announced, by an average of 12.82 per cent. To this the operatives would not agree. Negotiations between them failed, and work stopped. This was a major catastrophe for the country, and the Government immediately endeavoured to bring the parties together. But Lancashire stubbornness combined with industrial bitterness was a formidable barrier to surmount. Meanwhile the nation was losing £400,000 a day, while 350,000 men stood on street-corners outside silent mills. Sir Horace Wilson was sent north; he toured the cotton towns, haranguing one side, exhorting the other. Finally, in the third week of idleness, both sides agreed to a return to work pending wages arbitration. When this was known, at ten o'clock on the night of Thursday, 15 August, a sigh of relief went up from Lancashire comparable on a minor scale with the effect of the Armistice. But with the great question settled, a subsidiary problem presented itself: who was to be chairman of the board of arbitration? He must be acceptable to both sides, familiar with commercial life, a man of known impartiality, and a Lancastrian for choice.

Swift filled all requirements, and his appointment met with general approval. Of the many congratulatory messages he received he prized most one from Lord Mersey, who, as Bigham, K.C., had been his first leader. It was one of the last letters written by that grand old man of the law, for a fortnight later he died.

The Beach Hotel,
Littlehampton
17th August-29.

MY DEAR JUDGE,

Let me congratulate you. It is a great honour to have been selected for so important an office and the Country will know that the duties it entails will be well discharged.

Always Yours,
MERSEY

Swift himself welcomed his task. Some might have cavilled at exchanging a calm Sussex hilltop for an August week of Manchester, but to him a job of work was a challenge, and to be in Lancashire was to be home.

They should have known Swift in the County Palatine,

but Manchester was taken by surprise by the speed with which he and his four colleagues (two nominated by either party to the dispute) sifted the evidence and reached their decision. They began at 10.30 a.m. on Wednesday the 21st, and announced their decision at 8 p.m. on the Thursday. The employers' case for reduction, they found, had been made out. Wages reductions alone, however, were not the only remedies for the deplorable state of the industry, and they hoped the Government committee then considering the entire position would speedily report. But wages were all they were concerned with, and they awarded a reduction of 6.41 per cent.

They had split the difference. It was a common-sense solution of a wellnigh insoluble problem, illustrating once again the robust common sense of the man who epitomized that peculiarly English virtue. Of course, it met with criticisms, from both sides, and one paper was led to protest at the appointing of judges to tasks where they were inevitably exposed to odium. But they need not have been so tender of Swift. He was not sensitive to attack; he did what he thought was right, and if others disagreed and said so he did not care. He knew he was right, and to him that was enough.

The last word upon the arbitration was written by the *Economist*: 'Public opinion was so exercised by the national loss arising from the stoppage that it rightly forced both sides to appeal unto Caesar, and Caesar, as usual, responded by doing swift but rough justice.'

One trusts that the pun in the *Economist's* fourth last word was unintentional.

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After the vacation Swift was set another unusual, though this time not unprecedented task. In company with Mr. Justice Talbot he travelled west to try the Plymouth Election petition. He had had one prior experience of this decaying form of litigation, it will be remembered, at Oxford: in fact, the Oxford and Plymouth petitions are the only ones to have been tried since the war, and many consider them now extinct.

At the General Election in the previous May a well-known Plymouth Labour leader, Mr. J. J. H. Moses, had been returned in the Drake division, defeating Sir Arthur Shirley Benn by 2,000 votes in a three-cornered fight. Certain incidents connected with a wealthy philanthropist named Alfred Casanova Ballard induced the Conservatives to launch a petition to unseat the Labour member, briefing to that end a team of two K.C.'s and one junior. Mr. Moses had one K.C. and two juniors.

When the hearing opened on 17 October, Mr. Roland Oliver (now Oliver J.), the petitioners' leading leader, said that the petition was in substance founded upon a complaint of illegal influence by Mr. Ballard. That gentleman, who appeared to be an impulsive, not to say eccentric, benefactor, had spent £50,000 on a 'Ballard Boys' Institute', and by his open-handed generosity to the boys of Plymouth had acquired a great influence with their mothers and fathers—who of course doubled the rôles of parents and electors. He took a strong but oddly non-party view of the 1929 election, and told his boys that Mr. Moses, Lady Astor, and Mr. Hore-Belisha ought to be elected. (He later changed his views as to Lady Astor and supported her Labour opponent). He was alleged to have urged the boys to induce their parents to vote for Moses, to have had pro-Moses leaflets distributed to them, and to have advertised in similar vein in the papers.

The hearing lasted for eight days, to the accompaniment of considerable popular feeling. Crowds thousands strong gathered daily outside the Guildhall to cheer Moses and sing 'For he's a jolly good fellow' whenever they caught sight of Ballard. The festival air without was matched by the good humour within the court.

The member and his agent strenuously denied any connexion with Mr. Ballard's various 'stunts', and indeed seem to have been considerably embarrassed by them. They were warned by an anonymous letter of the impending publication of the advertisement in the Press, and hunted Plymouth for Mr. Ballard in order to have it stopped. They finally tracked him to his home, but 'owing to a determined housekeeper were unable to get nearer to him than to obtain audible evidence that he was asleep'. The audible sleeper himself went into the box, and in answer to the Hon. (now Sir) Stafford Cripps, K.C., counsel for Mr. Moses, he said he was disappointed at the result of his endeavours: 'the circular did me considerable harm. It was not popular with the boys, the parents did not like it, and there were torrents of abuse in the papers.' Mr. Oliver asked him, 'You are rather an impulsive person?' 'Madly so', was the answer. This came after his admission that once, on the spur of the moment, he had announced that on the day that 5,000 boys attended his Sunday Service at the Institute he would give each of them 10*s*.

On the last day a tremendous crowd gathered outside the court, and the atmosphere became tense. Swift ordered the doors to be locked. He then commenced his judgement, saying, 'In my opinion this petition fails and must be dis-

missed'. Mr. Ballard, he went on, had wide influence, and there was no reason why he should not use it in favour of a candidate. But he had gone beyond the legitimate use of influence by telling the boys of the Institute that if Moses got in they should have a tea and fireworks, and that if he didn't get in 'I may as well close the club'. The judge was not, however, satisfied that these words corrupted any voter or amounted to bribery. He was satisfied that Moses was no party to the advertising, and the petition would be dismissed with costs. Talbot J. concurred. The total costs were said at the time to amount to £20,000, and Mr. Roland Oliver asked that Ballard be ordered to pay a proportion of them. This was refused.

Though the doors were locked, the news contained in Swift's first words in some way managed to percolate beyond the building, and half-way through his judgement his voice was drowned by a startling torrent of cheering outside, while upon emerging at the conclusion he was surprised to find newspaper posters already blazoning the result. The crowd were delirious with a political excitement of a kind now becoming rare in England, and the judicial party drove away amid rounds of cheers. One member of the judge's household afterwards confessed to a feeling of relief that the petition had been dismissed: 'If it had been allowed I had the feeling that we might have got bricks instead of cheers'.

* * * * *

Swift's next big case was the trial of Lorang, already described, in 1930. In the following year he tried the Oxford murder case.

CHAPTER EIGHTEEN

THE OXFORD MURDER CASE

For murder, though it have no tongue, will speak
With most miraculous organ.

SHAKESPEARE, *Hamlet.*

'MEMBERS of the jury, about half-past seven on the evening of the 3rd August of this year, Mrs. Annie Louisa Kempson was found dead in her house "The Boundary", St. Clement's Street, Oxford. Her body was then lying in the dining-room covered with a rug and some cushions. The circumstances under which she was found appeared to show that she had been brutally murdered.'

So began Swift's summing up in the celebrated Oxford murder case of 1931. He always began to sum up like that in murder cases, taking the jury at once to the grim central fact round which the trial had revolved: he knew as well as any editor the importance of gripping the attention at the outset by a vivid opening. It was little things of this sort which accounted for his influence over juries.

Mrs. Kempson was the widow of an Oxford tradesman. She led a methodical and frugal life in a small house, deriving her income from the rents of certain property and supplementing this by taking in a lodger, a Miss Williams, who worked in the George Café. She employed no domestic help, probably from choice rather than necessity, for she was one of those women who find pleasure in the everyday tasks of housekeeping. She enjoyed keeping her home spick and span, and her friends termed her 'house-proud'.

But even the most conscientious housewives feel the need of a change from time to time, and when, towards the end of July 1931, Mrs. Kempson found that her lodger was going away for the Bank-Holiday week-end, she determined to do the same herself. She arranged to go to London to visit a friend named Mrs. Smith, and she purchased a motor-coach ticket available for a journey on Sunday, 2 August.

Miss Williams was going away the day before, on the Saturday, and on the Friday night she came home about 10.30 and boiled herself some milk for a nightcap. She left the

saucepan in the sink and the cup and saucer in the scullery. Mrs. Kempson was still up, and she had a chat with her in the dining-room. She noticed the remains of some tomatoes there, a fact which did not surprise her, for she knew that her landlady had a predilection for tomatoes. The next morning Miss Williams breakfasted on bread and butter and marmalade and tea. Mrs. Kempson prepared this meal, and herself took a cup of tea, but she had not then had her own breakfast; she was dressed in a black frock, but her hair was still in curlers and she was wearing her overall. At 9.20 a.m. Miss Williams gave her a ten-shilling note for rent, bade her good-bye, and departed to work. Miss Williams' duties at the café finished at 4.30, and she went directly from work to the bus terminus and so away on her holiday. As events turned out she was probably thankful that she had not planned to return to 'The Boundary' that evening. . . .

Mrs. Kempson never arrived at Mrs. Smith's house in London. Mrs. Smith waited and waited, but her friend did not appear, and by night-time she became somewhat worried. It was unlike the methodical Mrs. Kempson to change her plans without notice. Mrs. Smith sat down and wrote her a postcard inquiring what had happened. Upon reflection she wrote another message, and it was extremely fortunate in the interests of justice that she did so. This was a letter to George Reynolds, Mrs. Kempson's brother, inquiring if he knew why his sister had failed to arrive.

Reynolds, a college servant at Jesus College, was mystified when he got this letter on Bank-Holiday morning. He went out to 'The Boundary', but found the door locked and no signs of habitation visible. He telegraphed to Mrs. Smith, and in the evening received a reply that his sister had still not arrived. He went back to the house with his son. They procured a ladder, and the boy climbed in an upstairs window and then let his father in. He went into the dining-room, and there, covered up with a mat and three cushions, he found the dead body of his sister. . . .

The Oxford police acted with commendable and striking rapidity. The Chief Constable, Mr. C. R. Fox, was himself on the scene at 8.45, an hour after the horror-stricken brother had called in a policeman off his beat in St. Clement's Street. The Chief Constable appreciated the gravity of the case immediately, and telephoned to London. Chief Inspector Horwell arrived from Scotland Yard soon after midnight. Sir Bernard Spilsbury followed him a few hours later.

The authorities were confronted with a savage and brutal

murder. The unfortunate woman's body bore four grievous wounds: there were three wounds on the head caused by heavy blows with some blunt object like a hammer, and there was a sharp, clean-cut wound in her throat, three inches deep, which might have been made with a dagger or chisel. It had severed the carotid artery, and must have caused death in a short time. The upstairs rooms of the house were in disorder: drawers had been pulled out, trunks opened, and a deed-box had been forced open and its contents scattered. Clearly the place had been ransacked, but how much was missing it was impossible to prove. Miss Williams' ten-shilling note had disappeared, but the intruder seemed to have been disturbed in his search, for he overlooked a box containing twenty-nine pounds in notes.

The detectives took a careful note of the state of the house, and Sir Bernard made a post-mortem examination of the body. The police meanwhile were seeking information about week-end visitors to 'The Boundary', and the newspapers were assisting them by devoting great prominence to 'the lonely widow case'. Presently out of the huge welter of information that resulted Inspector Horwell found a number of facts leading him to desire an interview with a man named Henry Daniel Seymour.

This man was a salesman. He had for some time been employed by a vacuum-cleaner company, for whom he had canvassed the housewives of Oxford. He had sold a cleaner to Mrs. Kempson, and had visited her house in connexion with the purchase. In the previous year he had lost this employment, and had commenced selling ladies' underclothing from door to door in the same district. For some time prior to the murder he had not, however, been seen in Oxford, but he had visited the city on the Friday before the Bank-Holiday week-end, and had spent that night there under somewhat curious circumstances. He had been close to Mrs. Kempson's house on Saturday morning, and the murder could possibly have been committed then. . . . Yes, the Chief Inspector felt he would like to interview Mr. Seymour.

But Mr. Seymour had vanished. However, Scotland Yard have their own methods of following persons who do not wish to be followed, and on 15 August, twelve days after the discovery of the crime, he was traced to a flat at Brighton. He was arrested, charged with murder, and committed for trial before Swift at the Autumn Assizes.

The trial commenced on 20 October 1931. Mr. St. J. G. Micklethwait, K.C. (now Deputy Chairman of Middlesex

Sessions), and Mr. Wilfred Price prosecuted, and Mr. W. G. Earengey, K.C. (now Judge Earengey), and Mr. E. R. Guest defended.

The Crown case as outlined in Mr. Micklethwait's opening speech and as developed in the mouths of his witnesses consisted of two parts, the first concerned with the facts, so far as they were known, of Mrs. Kempson's death, and the second dealing with the actions of Seymour upon the tragic week-end. The task of the prosecution was to prove to the jury that these two parts were the two halves of the same story, to prove that these two pieces in this legal jig-saw puzzle fitted exactly together.

The opening half of the Crown case showed firstly that the dead woman had been murdered; secondly that she had been killed by being struck on the head from behind with a blunt instrument and then by being stabbed while lying unconscious on the floor; thirdly that the motive for the assault had in all probability been robbery. There was little dispute about these things. But there was hot debate as to a fourth factor, the time when the murder took place. Miss Williams had left 'The Boundary' at 9.20 on the Saturday morning, and Mr. Reynolds forced his way in at 7.30 on the Monday night. At what time in the intervening two and a half days had Mrs. Kempson been struck down? The medical evidence was of no direct help here, for Sir Bernard Spilsbury was unable to say, from the condition of the body when he examined it, whether death had taken place on the Saturday, the Sunday, or the Monday. He was, however, able to provide a vital link in a chain of facts establishing conclusively—so the prosecution said—that Mrs. Kempson had died not long after Miss Williams left on Saturday morning.

In the course of his autopsy Sir Bernard had examined the digestive organs. In the stomach he found a partly digested meal, while remains of the same meal extended into the upper part of the small intestine. This meal seemed to have consisted largely of bread and butter, and there was seen a yellow substance that might have been custard. Farther down the digestive tract, at the commencement of the large intestine, he found other food, among it being easily recognizable tomato skins. From what he saw Sir Bernard was able to say that death had taken place within from one to two hours after Mrs. Kempson had eaten a meal of bread and butter and probably custard, while about twelve hours before that she had eaten a meal including tomatoes.

The meal including tomatoes, said the prosecution, was

Friday night's supper, and the later meal was Saturday morning's breakfast. They buttressed this assertion with a number of other facts. Chief among them was the condition of the house: Miss Williams had been brought back by the police on the Wednesday and shown the house as the murderer had left it. In the scullery were the cup, saucer, and saucepan she had used for her Friday nightcap, just where she had put them, unwashed. In the dining-room were the remains of breakfast for two people. Upstairs she found her bed unmade and the slops unemptied. . . . All this pointed to Mrs. Kempson having been struck down before she had had time to perform her household duties on Saturday morning. Further, Mrs. Kempson's body had been found clad in her black frock and overall, and her hair in curlers, just as Miss Williams had left her. Tidy, methodical, house-proud woman that she was, said those who knew her, she would never have left the washing-up and the bed-making till later in the day, and thus the state of the house pointed, like the medical evidence, to death within an hour or two of breakfast, and went further than the medical evidence in saying that the breakfast was Saturday's breakfast. Two other facts supported this assertion—the fact that several people had called at the house after eleven o'clock on Saturday and had been unable to obtain a reply, and the fact that although it was Mrs. Kempson's invariable custom to tend her husband's grave on Saturday afternoons, she had not done so this week. The crucial importance of the time factor will become apparent when we have to consider how closely the two halves of the jig-saw fit together.

Turning from victim to accused, the prosecution called witness after witness to present to the jury as complete a picture as possible of Seymour's movements. The effect of their evidence was this. Seymour had early in July taken rooms at Brighton in the name of Harvey; he had a wife and child in Oxford, but for some reason he preferred to live elsewhere. On 22 July he had left Brighton and gone to stay at the Greyhound Hotel, Aylesbury. On Friday 31 July the landlord of the Greyhound was pressing him to pay his bill, and on that date he left Aylesbury, leaving his luggage at the hotel, and went to Oxford, his object being—so he told the police—to collect money owing from his former customers there. At 2.30 on that afternoon he met a Mrs. Andrews, an old client of his, on Headington Hill, and passed the time of day with her. At eight o'clock that evening he appeared at her house at Headington, saying that while bathing at Eynsham he had had his wallet stolen: could she lend him 4*s.* 6*d.* for his

fare to Thame, whither he was going by a bus at 9.30? She kindly lent him this money, and he ran off. But not to the bus station: he ran to a nearby ironmonger's shop, running no doubt because it was just closing time, and there he purchased two tools. One was a hammer and the other was a chisel.

At 10.30 the same night Mrs. Andrews' door-bell rang. In the words of Mr. Micklethwait's opening: 'She, unlike poor Mrs. Kempson, has got a man in the house and is not alone. She had got her son, and it is he who goes down and opens the door. He finds the prisoner standing at the door, with a story that he has missed his bus and wants to be put up for the night. He did not explain how he was going to manage if he had not missed the bus, when he had spent the money at the ironmonger's. Nor did he explain why he wanted to spend the night at Mrs. Andrews' when he had a house of his own not far away, where his wife lived.' The charitable Mrs. Andrews put him up. He hung up his light-coloured raincoat in the hall and put two parcels on the hallstand; when his hostess was cleaning the hall next morning she saw through the broken paper of the parcels the round head of a hammer and the blade of a chisel. He left at 9.30 the next morning.

That was Saturday morning, the morning when, according to the prosecution, the murder was committed. At 9.56 that morning a house decorator named Horn was walking down St. Clement's Street when he saw a man with a light-coloured coat over his shoulder standing at Mrs. Kempson's front door. He saw the door opened by Mrs. Kempson, the man step into the house, and the door shut. Horn could not say whether that man was the prisoner.

At 11.3 the same morning another of Seymour's old customers, Mrs. Collins, saw him in London Road, Headington. This was not far from the ironmonger's shop, and some twenty minutes' walk from 'The Boundary'. She spoke to him, and was struck by his agitated and nervous manner, and he must have observed her surprise, for he volunteered that he had had a car smash which had upset his nerves. He was next seen in an inn at Wheatley, four miles away, where he had two drinks, and where the landlord noted the oddness of his manner. Thence he had boarded a bus to Aylesbury and had gone up to his room at the Greyhound. He was coming downstairs again when the landlord met him with words that would surely cause a guilty heart to miss a beat: 'You had better come to the police station'. The landlord, his bill still unpaid, had just reported him as missing. Seymour asked to go upstairs again. 'No, you come along to the station.' At that Seymour said,

'I am hungry, I want something to eat', and went out, and the landlord did not see him again. The luggage, of course, remained at the Greyhound.

The prisoner hurried to London, and thence to his flat at Brighton, where he told Mrs. Belmore, his landlady, that his luggage had been stolen on the train. Mrs. Belmore noticed he was agitated, and he explained this by saying his wife had gone off to America with another man. He gave her a £1 note to buy provisions.

And there at Brighton he stayed, living quietly under the assumed name of Harvey, until 15 August, when he was arrested. He made a long statement to the police accounting for his movements during the week-end. Of the crucial time after breakfast on the Saturday morning he said, 'I decided to go to Bexley House, Old Headington Road, the Rev. Green's house, but I suddenly remembered when at the gates that the maid had asked me not to call in the mornings, as Mrs. Green didn't like early callers. She did not wish her work interrupted with. The cook's name is Mrs. Busby, so I changed my mind and returned to the Viking bus office, Headington.[1] . . . I found that there was not a bus for Aylesbury for some time, so I decided to walk to Wheatley.'

Mrs. Busby and Mrs. Green and two others were called by the prosecution to say that no such request had ever been made. (The prosecution were nothing if not thorough. They even called a string of rather inconclusive witnesses in the effort to prove that Seymour had not bathed at Eynsham when he said he had.)

In his statement to the police the prisoner admitted buying the hammer. He admitted buying another tool at the same time, but this, he said, was not a chisel. It was a screw-driver. The police when they searched the luggage at Aylesbury found the hammer. No chisel or screw-driver was ever found.

* * * * *

There, then, was the second half of the prosecution case against Henry Daniel Seymour. Did it fit together with the first half, with it presenting a picture of Seymour committing this dreadful crime? The answer to that question would be found in the jury's answer to the question 'Guilty or not guilty?' and manifestly it was going to be an answer difficult to forecast. The catalogue of Seymour's doings is a damning one, but when it is examined it is at once apparent that there

[1] This was in London Road, where Mrs. Collins had seen him at 11.3 a.m.

was no single fact proved in evidence directly connecting the prisoner with the crime. No property missing from 'The Boundary' was traced to him; no bloodstains were found on him; no one could say that he had been to the house; there was no direct evidence of any kind linking him with the crime. Had it been shown, for instance, that a banknote issued to Mrs. Kempson had been passed by him at Brighton, then one could say, 'Here is the deciding factor, here is the vice that clamps together the two halves of the prosecution case into an unassailable unity'. But there was no such banknote. The nearest approach to direct evidence was the testimony of Horn; but Horn could only say that *a* man had entered the house at 9.56. He could not say it was *the* man. No, the evidence was circumstantial, all circumstantial. It was as neat an example of a circumstantial Crown case as is anywhere to be found in the annals of English jurisprudence. There was evidence of opportunity, of motive, of preparation, of flight, of emblems of guilt. There was all the evidence of suspicion in the world, and it is easy to understand Inspector Horwell's reasons for making the arrest. But suspicion alone is not enough: the prosecution had to make out their case beyond reasonable doubt. Had they done this? Any one of the items of circumstantial evidence taken by itself was clearly insufficient; take, for instance, the question of Seymour's supply of money—on Friday night he is borrowing 4*s.* 6*d.*, saying that he has no money, yet after buying a hammer and chisel or screw-driver he has enough cash on Saturday to pay his fare first to Aylesbury, then to London, then to Brighton, to buy two drinks at Wheatley, and to give a £1 note to his landlady at the conclusion of the journey. Mr. Micklethwait naturally suggested that this sudden affluence was accounted for by the robbery of Mrs. Kempson's money. Was it? Whether it was or not, that evidence standing by itself was insufficient to justify a verdict of guilty. But when one added to it the evidence of the purchase of the tools, of the agitation of the man on Saturday morning, of his lies—the Crown claimed they were lies—about bathing at Eynsham and going to Mr. Green's house and the motor accident and his wife's elopement to America—when one added all these together, did they not amount to something more than grave suspicion, did they not force the edges of the jig-saw together as surely as a traced banknote would have?

Nevertheless there were places where the edges of the jig-saw seemed not quite to fit, and with these the defence were, of course, to make great play in their task of sheering the halves

apart in the jury's mind. The three chief weaknesses were the times, the chisel, and the hammer. The Crown claimed that Seymour had murdered Mrs. Kempson by means of two tools. Of these one, the chisel, was never found, and the other, the hammer, though it was found, *did not fit the wounds in the dead woman's skull.*

Spilsbury found that the head of the hammer was smaller than the indentations in the skull. The prosecution accounted for this by saying that Seymour had wrapped a towel or some such cloth round the head when making his assault, and Sir Bernard supported this by explaining how he had experimented with the hammer, covering the head with different materials and striking a board, until he produced an indentation of the same dimensions as the wound. This would account for the absence of any stains on the hammer; and this theory received support from a tiny piece of evidence, the finding by Sir Bernard of a tiny particle of fluff caught between the head and handle of the hammer: that minute particle was examined microscopically and found to consist of cotton and linen fibres. This did not, of course, prove conclusively that a cotton-and-linen cloth had been wrapped round the hammer; but it was consistent with it.

And so the discrepancy between hammer and wound was not only explained away, but was actually used to make the case stronger than it would have been had the weapon and wound fitted exactly.

The time factor was more vulnerable. Indeed, so much weight did the defence place upon it that at the close of the prosecution evidence Mr. Earengey submitted that Swift should stop the case, on the ground that his client could not possibly, upon the times given by the prosecution, have committed the murder. Miss Williams, he pointed out, left the house at 9.20 a.m.; after that Mrs. Kempson must have had breakfast, and after that, assuming that the murder did take place that morning, from one to two hours must, according to Spilsbury's evidence, have elapsed before she was struck down. Take the mean of an hour and a half; then if Mrs. Kempson had her breakfast within half an hour of Miss Williams leaving, the time-table would be: Miss Williams left, 9.20; breakfast over, 9.50; murder, 11.20. Yet at 11.3 Seymour was seen at a spot which was twenty minutes' walk away, and on the prosecution evidence he could not have committed the crime after that!

Swift overruled the submission. He had himself very carefully considered the times—in fact on the previous Sunday he

had with his marshal made the walk from ' The Boundary ' to the bus office to see how long it took. He thought—and indeed it is obvious—that Seymour could have done what was alleged in the times proved. Yet it was a narrow margin, a very narrow margin. If Mrs. Kempson had got her simple breakfast with haste, she might have finished it by 9.35. The minimum time allowed by Sir Bernard between meal and death was one hour, therefore the earliest she could have been killed was 10.35. (The prosecution said that the man seen entering ' The Boundary ' at 9.46 was the murderer, but there was no reason, of course, why a caller should not stay in conversation with his victim for some time before finding an opportunity of killing her.) Seymour, to be at the bus office at 11.3, must have left ' The Boundary ' at 10.43, or, if he ran or took a bus, perhaps 10.50 (but with all the hue and cry no one was found who had seen a man running).

The ransacking of the house must have followed and not preceded the murder: five minutes seems a reasonable minimum to allow for that. The time situation then amounts to this, that Mrs. Kempson could not have been murdered before 10.35, and that Seymour could not have murdered her after 10.45. With all the factors assumed in the Crown's favour, there was a ten-minute margin. If Seymour is assumed to have walked from ' The Boundary ' to the ironmonger's, the margin is reduced to three minutes. That is not much time to play with in a capital case.

However, there was obviously a case to answer, and Mr. Earengey opened the defence. Seymour's story that at the time alleged for the murder he was innocently debt-collecting was already known from his statement to the police, but his counsel proceeded to add a startling new element to the case. He proposed to set up an alibi, an alibi of a grim and unusual nature—an alibi not for the accused, but for the dead woman herself. He was going to prove that Mrs. Kempson was alive long after 11 o'clock on Saturday morning; he was going to call witnesses to say that they saw the widow walking in the streets of Oxford when Seymour was proved to have been well on his way to Aylesbury. ' If you believe those witnesses, there is an end of the case,' said counsel, and that was no more than the sober truth.

Nine persons were called who said they saw Mrs. Kempson at a time when the prosecution said she was lying dead in her own dining-room. An unemployed man who was standing outside a public-house saw her come from her house at 11.20 and go and post a letter. A neighbour saw her go into a baker's

shop at 11.30. An assistant at that baker's remembered her buying a loaf at that time. Two assistants in a grocer's shop remembered her buying some butter between 12 midday and 1 o'clock. A master-painter who had been employed by her late husband saw her leave her house at 12.30 as though going shopping. A husband and wife who knew her by sight saw her in St. Clement's Street at 3 in the afternoon, and another neighbour saw her in Cornmarket Street between 5 and 5.30.

All these witnesses were cross-examined with varying effect with a view to showing that they were mistaken in the day. The baker's assistant fainted during this process. The evidence of the first neighbour contradicted a statement she had made to the police. The grocer's assistants contradicted each other. The last of the nine witnesses admitted she might have had some doubt about the day. But the others were unshaken, and refused to concede that they were confusing that Saturday with the previous one or with the Friday, or that they had conjured their stories up out of the newspaper excitement.

The prisoner followed these witnesses into the box and told his story. He had three main matters to explain away—his erratic movements both before and after the Saturday morning, his purchase of the tools, and his whereabouts at the alleged time of the murder. Upon the first point he said that he was a 'wanted' man. He had been so foolish as to embezzle £96 of money due to his employers, the firm for whom he sold ladies' clothing. (This was perfectly true.) For this reason he had avoided the Oxford neighbourhood, where he was known, and had adopted an assumed name. The necessity of collecting his debts, however, coupled with an urge to see his wife, drove him first to Aylesbury on 22 July, then on the fatal week-end to Oxford. He had had a motor accident in June, and had suffered from nervousness subsequently. He purchased a hammer and screw-driver on the afternoon, not the evening, of 31 July. He had bought a bathing-suit and towel and gone bathing, had had his money stolen, and had borrowed from Mrs. Andrews. He missed his bus, and so stayed the night with Mrs. Andrews. The next morning he had set out to call on his customer, Mrs. Busby, at Mrs. Green's house, but when nearly there recollected she disliked callers in the morning, so had returned to the bus stop and inquired for buses to Aylesbury. That was where Mrs. Collins had seen him at 11.3: he had been there fifteen or twenty minutes then. He put both hammer and screw-driver in his suitcase at Aylesbury. He left the Greyhound in a hurry because he knew that if he

visited the police station as his landlord requested he would be arrested on the embezzlement charge.

It was not a very credible story even when elicited in answer to the friendly questions of his own counsel. Under cross-examination it sounded fantastic. He said he had 'a tremendous urge' to see his wife, so that on the 23rd, the day after arriving at Aylesbury, he went to Oxford to see her. But when he got close to the house he realized that the police would be watching it in their search for him, and hurriedly returned to Aylesbury. He had gone again on the morning of the 31st to see her, and had again turned back.

'And so you took the opportunity of buying a bathing-suit and a towel and a hammer and a screw-driver?'—'Yes.'

'Can you explain why you did that?'—'It is very difficult to explain. I am conscious that my ways are somewhat erratic.'

He said he bought the tools 'because I had in my head that it was quite likely that I might get a wood-working job somewhere, and that if I could purchase one here and one there, it did not call for large expenditure'.

He said he had come to Aylesbury to collect debts; yet all he collected in his nine days there was twenty-two shillings. He said he went to Oxford to collect more debts; yet he in fact collected none at all. He said he was terrified of being seen in the city where he was so well known and being arrested for embezzlement; yet he caught none of the frequent buses to Aylesbury until after midday on Saturday.

The cross-examination and Seymour's hesitation, his evasions and his palpable lies immeasurably increased the weight of the case against him. As the closing stages of the trial drew on it was evident that the prosecution's circumstantial case was an overwhelming case and, had it stood by itself, there would have been little doubt as to the verdict. But it did not stand by itself: it was counterbalanced by the dead woman's alibi. If any one of those nine witnesses for the defence were believed, Seymour was innocent. Nay, more, if the jury had a reasonable doubt as to whether or not to believe any one of those nine, they would by their oaths have to resolve that doubt in his favour. There was the strength of the defence, and there lay the case as it drew to its close, balanced on a knife-edge between the crushing force of the Crown evidence on the one hand and the positive recollection of those witnesses on the other. It was a contest between direct evidence and circumstantial evidence, between the sworn recollection of human beings and the mute voices of a hundred inanimate objects, from Mrs.

Kempson's unwashed breakfast dishes and her husband's untended grave to the hammer in the Aylesbury suitcase and the £1 note given to the Brighton landlady.

* * * * *

It had taken a long time, the careful sifting of this meticulously prepared case. The trial had commenced on Tuesday, and Wednesday had come and Thursday before the forty-nine witnesses called by the prosecution had told their stories and stood down. The County Hall had been thronged day by day with a milling crowd—many of them were University undergraduates—anxious to see something of the climax to the great murder mystery and the great man-hunt that had so long taken up space on the front pages of the newspapers. The fourth day, the Friday, came, and with it the almost unbearable poignancy of a human being at bay, a hunted man fighting for his life in a witness-box, defending himself so badly as the merciless questions were put steadily one after another. The sympathies of the beholder are always with the accused at this time, and perhaps it is well for the impartiality of justice when in a tense murder case a night for reflection intervenes, as it did here, between prisoner's evidence and jury's verdict.

For it was Saturday afternoon before the speeches were over and Swift began summing up. The judge had studied the evidence carefully and had painstakingly weighed its significance, and his address to the jury not only reflected his mastery of the complicated facts and his anxiety that the jury should have no doubt as to their proper function, but also bore evidence, from its arrangement and its phrasing, of considerable premeditation.

He soon went to the real question at the heart of the case: the time of the murder. 'It is clear that the prisoner could not possibly have murdered that woman unless it were done some time between half-past nine and a few minutes after eleven o'clock in the morning of Saturday the 1st of August; and it therefore becomes vital in this case, vital to the case of the prosecution, vital in its importance to the defence that you should ascertain, and ascertain beyond reasonable doubt, the time at which that woman was murdered.'

Having reviewed all the facts that pointed to life in 'The Boundary' having stopped short not long after Miss Williams left it on the Saturday morning, the judge turned to the nine witnesses. Were they mistaken? 'You must examine this evidence, and you must examine it in the light of what you know about the circumstances when it was first given. You

realize how the city of Oxford was teeming with excitement, how the newspapers were full of this terrible discovery which had been made.' With everyone discussing the case and the police theory (which had received early publicity) of death on the Saturday morning, could not people be mistaken as to time ?—' and once the idea is there in a perfectly honest person's mind that they saw a particular person at a particular time, nothing will take it out.'

Swift reminded them of the prosecution criticism of these witnesses. As for the man who saw Mrs. Kempson post a letter, if that was so, why had no one come forward to say they had received the letter ?

And if these witnesses were not mistaken, then of course the man seen going into the house by Horn was not the murderer ; but ' if a man who did not kill Mrs. Kempson went into that house on the Saturday morning, what has become of him ? What would be more likely than that anybody, hearing of the death of Mrs. Kempson, would come forward and say : " Mrs. Kempson dead ? Why, I went to see her on Saturday morning ! I called to collect the rates "—or to discuss her house property or something like that. Where is the man who went into that house at ten o'clock that morning, if he did not kill her ? '

Turning to Seymour's movements, the judge shortly recapitulated the evidence. Of his condition after the alleged time of the murder he said this : ' At eleven o'clock he was talking to Mrs. Collins, so agitated, so upset, and so different from anything she had ever noticed in him before that apparently he felt it incumbent upon himself to give some explanation, and he said : " I have been in a very bad motor accident. My nerves have gone." If, indeed, he had just left that awful scene in ' The Boundary ' his nerves might well have gone. Do you think that there was the real explanation of any condition of agitation that he was in ? '

* * * * *

The judge believed that Mrs. Kempson *was* murdered on the Saturday morning, and that Seymour *was* guilty, and after the foregoing passages the jury must have appreciated this. But he had followed his invariable habit of warning them at the outset that they might disregard any view of his, and when leaving this question of the nine witnesses he said, ' Ask yourselves whether that evidence convinces you that she was alive ; or, short of that, does it raise in your minds any doubt about it, any doubt about the case for the prosecution ? If it does, you will acquit the prisoner.'

So much here turned on ' reasonable doubt ' that the judge added a noteworthy passage on the meaning of those two words. ' I emphasize there the words " reasonable doubt ". There must not be allowed to interfere with or affect your judgement any fanciful or conjured-up doubt which may come into your minds. You must not say, " Well, here is this man who has sat in our presence for four or five days, and who has been into the witness-box and given us an account, he seems to be a very decent sort of fellow. True, he has been in monetary difficulties, but it is impossible to believe that a man like that would do a brutal thing like this." That is not a reasonable doubt.'

The summing up was concluded with these words: ' Remember that if there is a reasonable doubt about the matter, either as to the time she died, or as to the hand by which she died, you must acquit the prisoner. . . . Go and consider the matter which has been given you in charge, and a true verdict give according to the evidence. So help you God.'

The jury retired to their room. They were out for forty minutes and came back with the verdict of ' Guilty '. While the judge's clerk stood with the black cap in his hand, waiting to place it on the judge's head, Seymour broke into a long protestation of innocence. Swift listened silently, and when the prisoner ceased he made no comment, but uttered the formula of sentence according to law.

Seymour appealed, unsuccessfully; he was executed on the 10th day of December, 1931.

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Of the many murderers who came before Swift, Seymour is the least deserving of sympathy. That his attack upon the widow, whom he knew to keep considerable sums in money about the house, was premeditated can hardly be doubted. How far premeditated was it? What thoughts were forming in his mind when he purchased those weapons? Did he first intend—as Mr. Micklethwait seemed to hint he did—to murder Mrs. Andrews? The answers to these questions died with the man to whom a human life was worth ending for the sake of a few pounds.

There can be no doubt that he was rightly convicted. This account of the trial has had to be sternly compressed, and many little details have had to be omitted. Because the prosecution's case was an agglomeration of little details, this condensed report cannot show its full force. The label from the hammer, for instance, was not on that tool when found, but pieces of such a label were discovered in Seymour's suitcase. They

seemed to have been moistened. This by itself was a little thing, but tending as it did to show that the prisoner was anxious to prevent the hammer being identified and had wetted and removed the label, it added another brick to the indestructible edifice the Crown built up against him.

That shredded label, and the piece of fluff from the same hammer, and Miss Williams' unmade bed, and Mrs. Kempson's unanswered bell—these circumstances and a hundred others like them made up the circumstantial evidence that hanged Seymour, and this trial may well pass into legal history not only as one of the neatest examples of a circumstantial case, but also as an outstanding instance of the efficacy of such a case. Offered the choice of the prosecution's circumstantial evidence and the defence's direct evidence, the jury chose the former. It may seem surprising, even amazing, to some readers that of nine witnesses, some of whom were unshaken in cross-examination, the jury believed none. The jury not only did not believe them: they actively disbelieved every one of them, for had they been in doubt between belief and disbelief they would perforce have acquitted. Yet no lawyer will share any surprise that may be felt, for no lesson is sooner learnt in the courts than the utter unreliability of the human memory. Did not seventeen women identify Adolf Beck as the thief of their jewellery when, as we now know, he could not have committed these crimes?

CHAPTER NINETEEN

ENTICEMENT—AND LAW REFORM

It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium.

LORD JUSTICE SCRUTTON, 1932.

DESPITE the fact that the word 'consortium' is current coin in the legal profession, it is difficult to obtain a satisfactory definition of it. Ask any lawyer what right the law gives a husband over his wife, or a wife over her husband, and he will answer, as the learned Lord Justice did in the above quotation, from the judgement in the so-called 'Helen of Troy' case, 'The right to consortium'. But if you ask another lawyer what consortium is, he will undoubtedly reply, 'That right which one spouse has over the other'. Which does not advance the inquiry materially. Although the word is in everyday use in the world of law, the *Oxford English Dictionary* knows no other meaning for it than an association, as of bankers.

Perhaps it can be defined, though not with precision, as the right to the society and service of the other party to the marriage. If a negligent driver knocks down a wife in a road accident, her husband can claim damages from the driver in respect of loss of the wife's consortium while she is in hospital, and it is in that sort of action that the mysterious word is most frequently to be encountered in the law courts.

Occasionally, however, it makes an appearance from some other cause. Within four months of his appointment Swift tried a consortium case based solely upon the motive of revenge. A Mr. and Mrs. Simmonds were plaintiffs in this action, and they sought damages from a Mr. Thomas for three assaults committed by the latter upon the wife. Mr. Simmonds also claimed damages for loss of consortium consequent upon those assaults. Two of these attacks had resulted in a black eye and other phenomena, and the third was trivial. The object of the action was apparently not so much to obtain recompense for damage done, as to expose the conduct of the

defendant. Swift in giving judgement said that the husband had in 1900 married the wife, whom he knew to be a woman of easy virtue. The defendant had had relations with her prior to the marriage, and he continued these relations from within a few weeks after the wedding down to 1919, when the husband, whom the judge described as blind, stupid, and careless, but ignorantly innocent, discovered what was going on. He then brought this action in order that the public at large might share in his discovery. (Mr. Douglas Hogg, K.C., as he then was, appeared for husband and wife; Mr. Patrick Hastings, K.C., for Thomas.) Swift added: 'Mr. Simmonds was determined that if he could, he would expose the defendant, and he has by means of this action gratified, I suppose, that desire. . . . Mr. Thomas's conduct has been unutterably bad. I can find no language which, to my mind, sufficiently condemns it. . . . Mr. Simmonds has had the satisfaction of exposing him. In doing so he has also exposed to the world his wife's immorality, and in exposing to the world the treachery of his friend and the infidelity of his wife he has also exposed to the world his own stupidity and his own carelessness.'

The judge awarded £5, £10, and £25 respectively for the three assaults, and a further five guineas for medical expenses. He found there was no evidence of loss of consortium, and gave no damages under this head. And so in a judgement for £45 5*s*. ended a case which had occupied two days of the time of a High Court judge.

It was thirteen years later that Swift tried another claim for damages for loss of consortium, and this time it was one of those uncommon suits in which the loss alleged results from enticement. Moreover, if enticement cases are uncommon, enticement cases in which the wife is plaintiff are rare indeed. There have, in fact, been but three of these actions in the High Court: one before Darling J. in 1923, this one before Swift J. in 1933, and the third before Hawke J. in 1936.

The *dramatis personae* in this husband-enticing case were four in number. They were Cyril Ramon Newton, a dance-band leader; Mrs. Newton, to whom he had been married since 1917; Mrs. 'Pat' Hardy, the wife of a retired solicitor living at Scarborough; and Mr. Hardy, who, having retired, had become an ardent tunny-fisherman.

Mrs. Newton was the plaintiff, Mr. and Mrs. Hardy were the defendants, and Mr. Newton was the individual alleged to have been enticed.

Swift tried the case sitting alone, without a jury. It was an ordinary enough, if somewhat sordid, set of facts that Mr.

Doughty, K.C., outlined when he opened the plaintiff's case. After fifteen years of happily married life the Newtons had, he said, gone in the summer of 1932 to Scarborough, where Mr. Newton was fulfilling an engagement at the Spa. There they had met and become friendly with Mr. and Mrs. Hardy. Before long the plaintiff was taxing Mrs. Hardy with running after Mr. Newton, and was being rendered very unhappy by what she saw taking place. In September Mrs. Hardy and Mr. Newton spent a week in London together, and soon after that they left their respective spouses and commenced to live together near Newcastle. Mrs. Newton would not divorce her husband; she wanted him back.

An ordinary tale, and one told every day in the Divorce Division. But it was not so ordinary in the King's Bench Division, and the fact that it was being made the basis for a claim for damages seemed to some people to open up frightening prospects. What the plaintiff was saying was that Mr. Newton had left her because he had been enticed, and that Mrs. Hardy had enticed him by inviting him to her house, inviting him to London, inviting him to live with her, ' and that she used her sex attractions and charms when in Mr. Newton's presence for the purpose of enticing him away '.

Swift put his finger upon the crux of the case while Mr. Doughty was still making his opening speech. ' Isn't the position,' he asked, ' that if the defendant persuades or entices the husband she is liable, but if the husband pursues her it is a good defence ? '

' Yes, but one seldom pursues an object unless it is attractive, and if the lady deliberately makes herself attractive to invite pursuit, then she is enticing him.'

The judge pursed his lips at that proposition, but went on listening to the evidence.

Mrs. Newton said that when her husband returned from the week in London he admitted that he was in love with Mrs. Hardy. ' Then I absolutely saw red and picked up the first thing I saw, which happened to be a fire-iron, and would have struck him with it. But he held me, and when I calmed down I fainted.'

The other three persons involved were called for the defence. Mrs. Hardy said that at Scarborough relations between the Newtons appeared to be unhappy. She was not then estranged from her husband; he was away a great deal. In June she became aware that Newton was attracted by her, but she did not encourage this. She had not invited him to London nor had she taken the house at Newcastle or invited him to live there.

Counsel: 'Have you ever knowingly used your attractions to seduce this man from his loyalty to his wife?'—'Certainly not.'

They had made no secret of going to a hotel in London: 'We wanted this case to be a divorce case'.

Mr. Hardy said that his wife had never run after other men. In June she had asked him if she could invite Newton to lunch, as the latter liked fishing. The two husbands had spent three or four hours talking, principally about fishing. He, the witness, did not like musicians as a class, and was agreeably surprised with Newton. Newton's second visit to lunch was at witness's invitation.

Cross-examined, he would not say that he and his wife were now the best of friends. But he was not going to ruin her because of what had occurred.

He was now occupied professionally in tunny-fishing, and his business often took him away from home.

'I suppose a wife is worth more than a tunny fish?'—'I shall not discuss that with you.'

Finally Mr. Newton, the alleged enticee, gave evidence. He stated that his married life had not been continuously happy, and that the suggestions that he stay with the Hardys, that Mrs. Hardy stay with him in London, and that she come to live with him at Newcastle, were his suggestions.

Mr. H. I. P. Hallett (now Mr. Justice Hallett) then addressed Swift for the defence. This was a case of the greatest possible importance, he said. If it succeeded, the floodgates would be opened to an enormous quantity of undesirable litigation. It should not succeed for two reasons, the first legal, the second factual. The legal reason was that there was not in English law a right of action against a woman who had enticed a plaintiff's husband. The reason on the facts was that even if an action existed, there had not been proved to be any enticement here.

Doughty in reply urged that there was a tort of husband-enticing known to the law, and he cited the prior case before Darling and the remarks of Scrutton L.J. printed at the beginning of this chapter. Swift then indicated that he was inclined to agree, and counsel turned to the facts. This was the weak part of the plaintiff's case, as the judge well knew: he said to Doughty: 'Your case has not lived up to its opening. The state of perfect bliss about which you told me is not supported by the letters. They are rather like the pouring of oil on troubled waters.'

At the end of the argument Swift immediately gave judge-

ment. This was not a jury case, where a summing up was called for, and the judge had himself to state the facts as he found them and their application to the case in the light of the law. A judgement presents less opportunity than a summing-up for trenchancy, but at the same time permits, and indeed calls for, the expression of judicial views without any necessity for camouflage, and this case provides a good example of Swift's direct manner of deciding a case when unassisted by jurors.

He commenced by holding that an action lay. He continued: 'Mr. Hallett has warned me of the danger that will result if the floodgates of undesirable litigation are opened by a finding for Mrs. Newton. I am quite undismayed by that prospect. I have not got to think of the future or of what may be the result of my judgement. I have merely to consider the facts of the present case.'

The allegation against Mrs. Hardy must be that she induced Mr. Newton not merely to live with her, but to give up cohabitation with his wife and to abandon the consortium to which the wife was entitled. For the action to succeed he had to be satisfied that she had procured, enticed, or persuaded Mr. Newton from cohabiting or consorting with Mrs. Newton and had so alienated his affections from Mrs. Newton. After the parties had first met, things moved fast, but there was no evidence that in June or July 1932 Mrs. Hardy induced him to make love to her. She might have been a willing party, 'but that is quite a different matter from setting her cap at the man'. There was no evidence of any impropriety of an active character on the part of Mrs. Hardy during that period. There was no evidence of any inducement to Mr. Newton to make him make love to her.

'These things happen. You do not induce a person to fall in love with you. You are not persuaded to fall in love with another person. People drift into a situation in which, in a moment when she least expects it, a girl finds herself being violently protested to by a young man as to the depth of his affection. It seems to me that that was what really happened in this case. I should think that Mr. Newton had very great difficulty in refraining from looking after a good-looking woman. Mrs. Hardy is obviously an attractive person. When one finds that two persons, meeting in the circumstances in which Mr. Newton and Mrs. Hardy met, one away from his wife and family for a long period and the other living with a husband whose main interest was tunny-fishing and who took apparently little interest in his wife or her pursuits—when one finds that those

people drifted into an illicit, improper, and immoral affection for each other, it is greatly to be deplored, but not to be surprised at. This had the effect of alienating Mr. Newton's affection from his wife, but Mrs. Hardy is not to pay damages for that. There is no evidence that she induced him into that situation any more than that he induced her into it.'

No one who had heard the case could have failed to be terribly sorry for Mrs. Newton. But the action must be based on what happened when, after his return from London, Mr. Newton left his matrimonial home. It had not been proved that this leaving was in consequence of any advice or enticement from Mrs. Hardy. 'Sorry as I am for Mrs. Newton, badly as she has been treated, wicked as is the conduct of her husband and his paramour, I cannot hold that her case has been made out.'

He gave judgement for the defendants with costs.

Swift's judgement in this case led to two important results. In the first place it disposed of the argument that a woman could be sued if she were attractive and had by reason of her beauty, wit, 'sex appeal', vivacity, or some other alluring attribute, attracted a married man to leave his wife. To erect a legal claim there has, it seems, to be an active enticement of the individual, and not a general fascination at large. Had Swift's common-sense view not prevailed, it is easy to contemplate the loosing of those floodgates that so troubled the mind of defending counsel.

Secondly the case contributed materially to a noteworthy reform in the law of husband and wife, doing this by demonstrating in glaring fashion the final futility of an outworn rule.

This was the rule that a husband was liable for his wife's civil wrongs, or torts. If a wife slandered a neighbour or negligently ran down a pedestrian with her car, the husband, even though he had no lot nor part in it, could be made to pay. This was not unfair in the days before the Married Women's Property Acts, when wives had no separate property; the wife's money was in the husband's pocket, and there was some justice in permitting an outraged plaintiff to follow it there. But with the passing of those Acts half a century ago there passed any justification for the rule. The rule, however, went on, and husbands continued to pay for their wives' torts. Then came this case, with its neat provision of a *reductio ad absurdum*.

For consider what happened. Mr. Hardy's wife had left him, she had dissolved the matrimonial home, she had done him an irreparable wrong. Yet he as well as she were sued, and had

the action succeeded he as well as she would have been liable to pay whatever sum were awarded as damages. ' A Gilbertian situation ! ' declared Swift. He went on :

' A married woman is sued because it is said that she had seduced another woman's husband. If she has done that, she has done her husband the greatest wrong that a wife can do ; she has outraged every sense of matrimonial decency and propriety ; she has ruined her husband's married life. And for all that *he* has to pay ! '

The rule could not long survive so great an exposure of its operations, and two years later it was abolished by a measure rejoicing in the name of the Law Reform (Married Women and Tortfeasors) Act.

Not for the first time Swift's blunt tongue had contributed to the removal of an injustice from the law of England.

* * * * *

The enticement case was one of many in which the judge's forceful remarks encouraged or hastened some amendment in the law. He was no professional reformer, of course, no white-hot campaigner against abuses, but his generosity, his outspokenness, and his common sense led him from time to time into the paths of reform—and with greater success than often attends the confessed reformer, whose pleas are liable to be dismissed as the ravings of a zealot with a bee in his bonnet. With the enticement case may be bracketed his attacks upon the old divorce law and his observations upon the possession of revolvers in the Fahmy case ; moreover, he was too practical to share the veneration felt by some deeply learned judges for the law because it is the law, and he was no more a respecter of doctrines than he was of persons : ' Absurd ', he cried in 1922 when confronted with the old rule that where a husband and wife engaged jointly in crime the wife was presumed to act under the ' coercion ' of her husband and therefore to be innocent. In 1925 this rule was abolished.

Compulsory motor insurance was also helped into being by his comments. The most frequent of all civil cases are those in which the plaintiff is the victim of a road accident, and Swift was early in his career touched by the plight of victims deprived of compensation not by any fault of their own, but by the impecuniosity of the motorist defendant. As early as 1926 he prophesied the lines upon which Parliament would ultimately move : ' The time is coming when a man should not be allowed to have a motor-car on the highway unless he has made arrangements for ample compensation for any injuries he may

cause'. Four years later the Road Traffic Act was passed making it compulsory to insure against death or bodily injuries caused by the driver's negligence. Swift would have gone further; his demand was compensation for any injuries, not merely those caused by negligence.

It was not so much in the realm of the law itself, however, as in the field of procedure that the judge left his mark as a reformer. As an advocate he had been skilled in the rules of court, and as a judge he retained a technician's interest in the mechanics of litigation added to a realization that defects in procedure can, as Dickens well knew when he created *Jarndyce* v. *Jarndyce*, work as great harm as defects in the law itself.

The provision of a court shorthand writer for civil cases was his especial triumph. This innovation, for which he had been pressing all his judicial life, was made exactly one week before he died. He had always protested at the custom thrusting upon King's Bench judges the task of laboriously compiling a long-hand note of the evidence given before them. He took notes when necessary, though he was always unfeignedly glad to find that the parties had privately arranged to have a shorthand writer in court. His objection to note-taking was founded on more than mere inconvenience, for he liked to watch as well as hear a witness, and writing distracted his attention. His mind was so retentive that, save in long cases, he needed no note for his own purposes, and his notebook recorded in most cases only the names of the parties and counsel. Those who sought to change this attitude of his usually had cause to regret it. One Northern Circuit junior, for instance, was once conducting a case which did not commend itself to the judge and, having extracted from a witness a favourable answer, he looked meaningly at Swift and said: 'I hope your Lordship will make a note of that answer'.

Swift laid down his pencil: 'Mr. ——, you are not in the County Court now. High Court judges are not bound to make notes.'

The late Lord Justice Scrutton once made the same error as that barrister. Meeting Swift in the judges' corridor, he started to complain of the inadequacy of the judge's note in a case then before him in the Court of Appeal. Swift retorted, 'I'm not a Court of Appeal note-taker!' and walked on.

* * * * *

Lord Birkenhead appointed Swift to be chairman of two committes to consider procedural reforms. The first, in 1920, dealt with County Courts, and recommended many changes,

which were promptly made. The other, two years later, considered the thorny question of rearranging the circuits. The report of the latter advocated greater elasticity in Assize arrangements, the amalgamation of the two Welsh circuits, and the removal of certain towns from the circuits. When he came twelve years later to give evidence before the Royal Commission on the Dispatch of Business at Common Law, Swift expressed regret that none of these recommendations had been effected.

His greatest contribution to reform was made in 1932. Two years earlier the London Chamber of Commerce had presented to the Lord Chancellor, Lord Sankey, a strongly worded memorandum upon the necessity of cheapening and speeding litigation. The Chancellor determined to act, and after consultation with the Bar Council and the Law Society, rules were drawn up providing for a new mode of trial for certain short non-jury cases in the King's Bench Division. This was due to come into force on the first day of the Trinity sittings of 1932, and was, appropriately enough, to be named the New Procedure. So far as possible costly technicalities were to be shorn away, and speed and ease of trial were to be advanced by taking the preliminary stages of suits from the jurisdiction of the Masters and entrusting them to the judge who would try the case. The new rules thus cast an especial burden upon the judge, and the success or failure of the New Procedure lay, to a large extent, in the selection of the right man to launch the experiment.

Lord Sankey chose Swift. Writing to him after a meeting of the committee settling the new rules, he said :—

Private.

HOUSE OF LORDS,
S.W.1.
21*st March*, 1932.

MY DEAR SWIFT,

I was very much obliged for all your help at the Rules Committee the other day. I am very anxious to get a good start for our new procedure, and to get it on a proper basis, and, as I told you, in my view, you are the one to do it. . . .

With kind regards and best wishes for the vacation,

Yours very truly,

The Hon. Mr. Justice Swift. SANKEY

Mr. Justice Macnaghten was selected as the second judge for the new list, and on 24 May he and Swift commenced sitting

' in court as chambers ' to give directions to litigants proposing to utilize the new mode of trial. Upon taking his seat Swift summed up the aims of the experiment in these words :—

' Up to now a cause has meandered along the river of Justice in any manner that it liked. It has bumped into banks, it has tarried in locks, it has even anchored in midstream.

' Litigation up to now has been very much " go as you please " between the parties, or rather between the Masters and crews who guide their movements.

' It is proposed to alter this, voluntarily at first, compulsorily if necessary.

' The whole idea of the New Procedure is to get rid of the law's delays in the law courts.

' The scheme is that when once a writ is issued, the court itself should, like the compulsory pilot, take charge of the case ; and agreement between parties which delay and hang up other users of the stream should be promptly and effectually moved on or turned out into some by-pass into which they can go at their leisure.

' Celerity connotes cheapness ; celerity and cheapness combined mean more time for dealing with an increasing litigation.

' That is our object.'

The object was achieved. Four weeks after the first writs had been issued under the new rules, the first New Procedure cases came on for trial. (The wags dubbed it ' The Swift Procedure '.) The new speed and cheapness proved popular, and the two judges were kept continually busy. For eighteen months Swift did not go circuit, but stayed at the law courts acting as express pilot for the many craft utilizing the new stream. (The enticement case was one of these vessels.) The success of the experiment caused envy from craft pursuing a more sluggish course in other channels, such as the common and special jury lists, and presently the majority of the successful features of the New Procedure were extended to the other lists. After that had been done there was little reason for the New Procedure itself to exist as a freak newcomer, and in the term after Swift's death it was abolished. It was the greatest procedural experiment since the setting up of the Commercial Court in 1895, and it has left its legacy behind in the greater freedom of movement to-day in all the channels of justice that make up the civil work of the King's Bench.

CHAPTER TWENTY

THE CIVIL SIDE

'I may not always be right; but what I say here goes.'

SWIFT liked trying civil cases—whether in the New Procedure list or out of it—partly because where no one's life or liberty was at stake he had less need to restrain his buoyant light-heartedness. The public felt this, and there never lacked an audience in K.B. Court 1 when he presided. Indeed, there were habitues of the public gallery who never failed to appear when he was taking civil work in London (one was a retired railway servant whose acquaintance with the judge dated from the latter's busy days at the Bar when he was so often found on the London–Lancashire expresses); these followed him as faithfully as any first-nighter follows his favourite actor. It is always a first night for the drama of the law.

Nor did the drama lack the requisite comic relief when Swift played lead. The problem of laughter in court was a peculiarly Swiftian problem, one elevated to the category of dilemma by two conflicting aspects of his character. On the one hand, as a staunch upholder of the law's dignity, he deprecated any public interference with the judicial calm of his court; on the other his lively sense of humour led him continually to say things that inevitably shattered that calm with mirth. In his early days he attempted to escape the dilemma by severity, and many and many a time he threatened to clear his court after an ebullition of merriment. But admonition became a weary task, for the threats had to be repeated in wellnigh every case. Some sign of a weakening in attitude may perhaps be detected in a ruling he gave in 1928 on this subject. 'There must be no laughter at the back of the court. The jury and counsel are entitled to laugh, and I shall laugh when I want to laugh. But the public who come here to watch these proceedings must not take part in them by indulging in laughing or anything else.'

Towards the end he gave up the thankless task of quelling the public appreciation of his wit. Perhaps he had this dilemma in mind when he told a Justice of the Peace who gave evidence before him: 'Let me give you a little advice: never in your judicial capacity make a joke!'

It is always impossible to do justice in print to an extempore flash of wit, and the difficulty is deepened in Swift's case by his words deriving their point not only from the crisis of the moment, but also from his delightful accent. The Lancashire tang gave a piquance to his words that no printed page can capture; nor is it even possible to counterfeit his tones by phonetic spelling—although any reader desiring to hear a rendering of those tones need only apply to a barrister of his acquaintance. There can be very few barristers in England who have not at some time or other recounted a 'Swift story' with a more or less accurate imitation of the accent.

Court 1 at the law courts in the Strand became peculiarly Swift's arena, and many lawyers will never fail to associate it with the cheery, rubicund countenance and the keen eye ranging the court, missing no movement that went on. Those who dropped in there might hear an exchange such as that following a barrister's comment that undertakers rarely appeared in that court. Swift interposed: 'No, we go to them. We make one application. There are no adjournments.'

On another day he was impressed to learn that a witness spoke twelve languages. 'I myself speak only two,' he said—'English and forensic'! To the latter language he contributed a delightful euphemism when, finding it necessary to criticize a brother judge's finding, he remarked that the latter had 'lapsed into inadequacy'.

Many of the judge's pithy sayings were directed at witnesses who would not speak up. To one, a veterinary surgeon, he said, 'Do speak up—don't whisper as though you were giving us a tip from the horse's mouth'. To another, a soldier, he said, 'You are ruining your chances of promotion by not speaking up. You will never be a sergeant-major.' To an inaudible housewife he said, 'Imagine that jury-box is your backyard and you want to talk to your husband at the bottom through the kitchen window'. His dislike of *sotto voce* evidence became so well known that the usher in Court 1 kept a card on which he had written 'SPEAK UP', and discreetly displayed this when occasion arose.

Swift did not disdain the pun. Counsel named Batt once concluded his case and hurried out of court. His opponent thought of some application and, not noticing the absence of an adversary, rose to make it. 'Stop,' came from the Bench, 'the Batt has flown!'

Once he even embarked upon parody, for being told that the police in a certain district did not take measurements after road

accidents unless they were fatal, he observed, ' Theirs not to reason why, No measurements unless they die '.

As these pages have already shown, it was not only wit that rewarded the visitor to his court. He was regaled from time to time with the more solid fare of an aptly turned truism or a common-sense epitome of some worldly failing—as when the judge remarked, ' Sometimes one finds that when relations are helped they begin to rely on the assistance as if they had a right to it, and if they are not given it they become nasty '. That shaft must have gone home in many a breast. An American tourist who dropped into Court 1 on a hot July day in 1932 was so impressed by what he heard as to remark, ' Gosh ! Solomon and Socrates knew their stuff, but this dolled-up beak of yours has got 'em on the floor for a ten count sure ! ' A bystander wrote those words down and sent them anonymously to Swift, who was delighted at this unorthodox tribute. Swift once corrected counsel, who had said that his client needed certain articles of jewellery, by quietly remarking, ' A woman may desire jewellery, she never needs it '. His epigrams on married life, such as those evoked by the Revelstoke breach case, were widely quoted. Another was, ' I don't believe there is a man in this world who knows what his wife intends to do five minutes hence '.

Another subject from which the British public can always extract amusement is the consumption of alcoholic liquor. In 1931 a witness, asked how long he had tarried in a public-house, replied, ' Long enough for a pint '. With the faintest smile Swift asked the rather youthful counsel in the case how long that was.

Counsel apologetically stated that he was not allowed to give evidence.

' Yes, but there are some matters which are of common knowledge.'

The barrister equivocated, suggesting that the time would depend on one's thirst, but the witness, tiring of the dialogue, came to his assistance by volunteering, ' When I've got a bit of money I can drink two pints in a quarter of an hour, sir '.

' Then we may allow seven and a half minutes in this case,' said the judge, and tapped his pencil sternly to suppress the laugh that arose from the public gallery.

Like most lawyers, the judge was not a teetotaller. He never, however, acquired that nice taste for vintage port which is supposed to be a heritage of the Inns of Court, his personal preference being for whisky. He was a staunch supporter of the Englishman's right to drink in moderation, and once—

it was at Gloucester Assizes in 1934—delivered himself of a striking commendation of alcohol, saying, 'It cheers people, makes conversation, and spreads geniality. There is nothing wrong in it if it is taken in moderation. The taste is pleasant—so I am told—and it warms one. Who would pay for a cocktail if it were no more pleasant than water or milk? People pay for drink because it influences them, and not necessarily in an improper way either. Taken in moderation there is no reason why they should not have it.'

It was in the same year that he had before him a defendant charged with driving a motor-car while under the influence of drink. The evidence was slender, and Swift thought that there should be an acquittal. It had been said that the man had had a small whisky-and-soda late on New Year's Eve and another after midnight to salute the New Year. 'Now what are the facts?' Swift asked the jury, with his well-known twinkle. 'Why, this man had one drink in 1933 and didn't have another till 1934!' The hint was taken and the man acquitted.

* * * * *

One of the civil cases heard in Court 1 in the spring of 1927 afforded an entertaining day. It arose out of an accident on the West Runton golf-course during a game between a Miss Oldham and a Mr. Cleghorn. The latter's sister was also present, caddying for Miss Oldham. At one hole—ominously enough the thirteenth—Mr. Cleghorn muffed his drive. His opponent, apparently deeming him in need of instruction, cried, 'This is the way to do it!' and proceeded to demonstrate by addressing an imaginary ball and taking a swing. Unfortunately the demonstration was marred by the club at the end of the follow-through striking Miss Cleghorn in the face and knocking her unconscious.

Miss Cleghorn sued Miss Oldham for negligence. Her counsel, the late Mr. Martin O'Connor, was apparently not a golfer, and was puzzled by some of the terminology. In particular he was unable to understand why Miss Oldham found it necessary to speak to an imaginary ball.

Swift quickly corrected him: 'Mr. O'Connor, you do not speak to the ball before you drive; you speak to it afterwards. You are thinking of addressing a jury, which is one thing; addressing a ball is another!'

Mr. Croom-Johnson, K.C. (now Mr. Justice Croom-Johnson), for the defendant, asked a witness whether the element of danger in games did not add to the enjoyment.

Swift: 'You are not suggesting that people enjoy their golf more because they may be driven into? The language one hears does not suggest that it is pleasurable.'

The defence was that Miss Cleghorn was herself negligent in standing so close as to be hit. The jury, however, negatived this. They found that Miss Oldham had been negligent and Miss Cleghorn had not, and they awarded £150 damages. Croom-Johnson then argued that judgement should not be entered because the plaintiff had voluntarily incurred the risk; he cited an old case on this point. The judge stopped him, 'In that case the plaintiff was a trespasser. Here the plaintiff was lawfully on the golf-links. When you and I were young we should have called her the chaperone, but I understand such persons do not exist nowadays.' He added that the law of negligence was the same on a golf-course as on a highway or anywhere else, and he gave the 'chaperone' her £150.

A suit so unusual as almost to merit that overworked adjective 'unique' came before the judge in 1936. This was *Beresford* v. *Royal Insurance Co., Ltd.*, a case destined to outlive the judge, coming finally before the House of Lords some months after his death. The action was brought by the administratrix of the estate of a Major Beresford to recover £50,000 due under the major's life-insurance policies. She said that the major was dead, and therefore the insurance moneys should be paid. The company replied that it was contrary to public policy that, in the circumstances of the insured's death, any payment should be made. What had happened was that on 3 August 1934 the major was in debt to the tune of £60,000 and was at his wits' end for cash. He borrowed all he could on the security of his policies, and now at three o'clock on the afternoon of this day the policies would lapse unless the premiums were paid. Shortly before three o'clock he hailed a taxi. As the taxi approached St James's Palace he asked the driver to note the time by the palace clock. The cab turned into St. James's Street, and as it did so Major Beresford shot himself dead. The horrified driver pulled up; and the clocks commenced to chime the hour of three.

A jury found that the deceased was of sound mind when he committed suicide. After long arguments Swift held that it was not contrary to public policy that the moneys should be paid. The Court of Appeal reversed this decision, and the House of Lords upheld the Court of Appeal. This affirmation of the law's hostile attitude to suicide caused some adverse comment at the time, but the case can hardly be one of wide application, for there cannot be many in existence sufficiently

altruistic to outdo the Merchant of Venice and pay their creditors not with a pound of flesh, but with their very lives.

Even this sad action was enlivened with a flash or two of the Swift wit. One witness was a doctor, and the judge was anxious to pin him down to the number of cases of a certain type he had encountered. All he would say was ' lots '. How many cases last month ? ' Lots of them, my Lord.' ' Well, did you see a *hundred* in the last month ? '

The number startled the doctor : he ejaculated ' Lord, No ! '

Swift, slowly but instantaneously : ' I would have you know that I am entitled to the possessive pronoun '.

* * * * *

Without a doubt the class of civil case most productive of public interest are cases of defamation. There is scarcely a corner of human affairs that is not at some time or other explored in such actions. A performance of *Elijah*, a millionaire's party, an illusionist's secrets—these were the subject-matter of some of Swift's libel trials. But the most unusual of all these trials to come before him took the shape of one of the most bizarre lawsuits of modern times. It was an action brought by a magician—a real professing magician—against Miss Nina Hamnett, the author, and Constable & Co., the publishers of a book called *Laughing Torso*. The magician was Aleister Crowley, a man described by his friends as the greatest living poet and by his enemies as the worst man in the world, and for four days in April 1934 Swift and a jury and as many of the public as could pack into Court 1 listened wide-eyed to a story of White and Black Magic, of an abbey in Sicily devoted to a magic cult, of curious rites and dark imaginings.

' Do what thou wilt shall be the whole of the law. Love is the law ; love under will.' That, it was stated, was Aleister Crowley's creed, and in 1920 he had started a community in a remote farmhouse in Sicily for the study of White Magic. From that place rumours had from time to time percolated into the outside world, and occasionally lurid stories had appeared in newspapers. Crowley had taken no action to contradict such statements until there appeared this work, described by the publisher's counsel as ' a book of gossipy trifles by a woman who was a sort of clearing-house for the news of the artistic world '. There she had stated that : ' Crowley had a temple at Cefalu in Sicily. He was supposed to practise Black Magic there, and one day a baby was said to have disappeared mysteriously. There was also a goat there. This all pointed to

Black Magic, so people said, and the inhabitants of the village were frightened of him.'

Upon these words Crowley founded his action, the gravamen of his complaint being that it accused him of ' having practised that loathsome thing known as Black Magic ', whereas what he had been concerned with was White Magic. White Magic, as his counsel (Mr. J. P. Eddy) explained in opening the case, was on the side of the angels, but Black Magic was a dreadful thing, associated with the degradation of religion, the invocation of devils, evil in its highest forms, and even the sacrifices of children.

For two days Crowley stood nonchalantly in the witness-box stating his beliefs and practices and parrying the thrusts of Mr. Malcolm Hilbery, K.C. (now Mr. Justice Hilbery), for the publishers, and Mr. Martin O'Connor, for the author. The Cefalu farmhouse, he said, was the Abbey of Thelema. Thelema was the cult of magic. He had furnished the main room as a temple for the performance of magic rites. His magic was white, not black. The only goat on the premises was kept for its milk. There had been a baby at the Abbey, of which he was the father, but he had never heard talk of a child disappearing. He did not sacrifice animals. At the conclusion of his evidence Swift asked him to define magic. It was the science and art, he replied, of causing change to occur in conformity with the will; it was White Magic if the will were righteous, and Black Magic if the will were perverse. It might involve the invocation of spirits.

Swift: ' Is magic the art of controlling spirits so as to affect the course of events ? '—' That is one small branch of magic.'

' When the object of the control is bad, what spirits do you invoke ? '—' You cannot invoke, or bring down, evil spirits. You must evoke them, or bring them up.'

The defence was twofold: in the first place it said that the passage in the book (if it was defamatory, which was denied) was true, and in the second place it sought utterly to discredit the plaintiff's character. Hour after hour Crowley stood repelling the assaults of two skilful cross-examiners, matching his sublety against the deadliness concealed beneath Mr. Hilbery's assumed languor, and answering Mr. O'Connor's wiles with flashes of real wit. The adroitness of some of this thrust-and-parry reminded one of a Whistler or a Wilde in the box, and brought frequent laughter to the aid of the other emotions evoked (or invoked) by the case. He told Mr. Hilbery that he called himself ' The Beast 666 ' and ' Master Therium '. ' Therium ' meant ' Great Wild Beast '.

' Do these titles convey a fair expression of your practice and outlook on life ? '—' " The Beast 666 " only means " sunlight ". You can call me " Little Sunshine ".'

Later he agreed that he had supplied material for a certain newspaper article. The article stated, ' They have called me the worst man in the world '.

' Is that true ? ' inquired counsel.

' I hear a new canard about me every week. Any man of any distinction has rumours about him.'

' Does any man of any distinction necessarily have it said about him that he is the worst man in the world ? '—' Not necessarily. He has to be *very* distinguished.'

There was more laughter when Crowley was telling Mr. O'Connor that he had no recollection of being served with a summons. ' If anyone gives me a piece of paper I would put it in my pocket and probably forget all about it. Only yesterday I was given a judgement summons as I left this court. It was a very nice shade of yellow.'

' Have you got it here ? '—' No. I gave it to someone. *I* didn't want it.'

There was no merriment, however, when certain of the plaintiff's poems were read to him by counsel. It was put to him, and denied, that he had written work ' too indescribably filthy to be read in public '.

' Would it be true to say that practically all your poems are erotic in tendency and grossly indecent in expression ? '—' It would be entirely untrue. I have written a volume of hymns which have been highly praised.'

More extracts were read, and counsel asked, ' Haven't you built a reputation on books that are indecent ? '—' It has long been laid down that art has nothing to do with morals.'

These excerpts had a visible effect upon Swift. Presently he referred the plaintiff to an article written in 1923 and stating, ' It is hard to say with certainty whether Crowley is man or beast '.

' Did you take any steps to clear your character ? ' he demanded.

' I was fifteen hundred miles away. I was ill and I was penniless. I wrote to my solicitors and found it impossible.'

Martin O'Connor later invited Crowley to demonstrate his magic in court: ' Try it on Mr. Hilbery, and see if you can do him any harm ! '

The bystanders instinctively glanced towards that distinguished gentleman, expecting perhaps to see him turn into a black cat. He did not. The plaintiff declined the invitation.

'You say,' went on O'Connor in his muffled voice (he had a cleft palate), 'that on one occasion you rendered yourself invisible. Would you like to try to do so now? If you don't,' he added sternly, 'I shall denounce you as an impostor!'

The answer was: 'You can ask me to do anything you like, but it will not alter the truth.'

The plaintiff remained visible.

The defendants, the publishers, called a Mrs. Betty Sedgwick, known as Betty May, an artist's model. She described life at Cefalu in 1922. After tea, she said, there was a ritual in the Temple at which Crowley appeared in a robe with a cowl, accompanied by his 'spiritual wife', dressed in scarlet, and also known as 'The Scarlet Woman'. Mrs. Sedgwick had seen a cat sacrificed on an altar and its blood drunk.

Mr. Eddy cross-examined her as rigorously as his own client had been. Could not her life before marriage be described as 'drink, drugs, and immorality'? She denied this.

There was a startling development when counsel picked up a bundle of letters from his desk and demanded: 'Are you here to help the cause of justice or to sell your evidence?'

The witness denied selling her evidence, whereupon counsel produced a number of letters which, he said, had passed between her and the defendants' solicitors, and also one written he said to 'Bumbletoff' from 'Poodlediff'. The witness admitted that 'Bumbletoff' was her nickname, but denied ever having discussed the case with 'Poodlediff'. In re-examination she said she had no idea how Crowley had obtained those letters. They had been stolen, she said.

Swift: 'Whoever has these letters is, according to Mrs. Sedgwick's evidence, in possession of stolen property. It would be very interesting to know how Mr. Crowley came to be in possession of letters between the defendants' solicitors and this witness.'

Mr. Eddy said he made no sort of imputation against the defendants' solicitors, and the judge at the close of the case stated that there was no reflection upon them. By now the jury were seen to be becoming restive, and when he came to open Miss Hamnett's case, Mr. O'Connor shrewdly invited them to stop the case and spare his client the indignity of the witness-box. The jury expressed a desire to accept this invitation, whereupon Mr. Eddy addressed them, and Swift indicated the legal issues. The judge added:

'I have nothing to say to you about the facts except this: I have been for over forty years engaged in the administration of the law. I thought that I knew every conceivable form of

wickedness. I thought that everything which was vicious and bad had been produced, at one time or another, before me. I have learned in this case that we can always learn something more if we live long enough. Never have I heard such dreadful, horrible, blasphemous, abominable stuff as that which had been produced by the man who describes himself to you as the greatest living poet.'

The jury then found for the defendants.

The case had two sequels. Three months later Crowley stood in the Old Bailey dock charged before Judge Whiteley with receiving Mrs. Sedgwick's letters well knowing them to have been stolen. He was found guilty, and was bound over. The second sequel was the hearing of an appeal by Crowley against the judgement. The verdict was upheld by the Court of Appeal; and so ended the Black Magic case.

* * * * *

Within a few months another of the judge's cases went to appeal, and this time Swift's judgement was upset—resoundingly upset. This was not a civil, but a criminal case, the trial of Reginald Woolmington for murder.

CHAPTER TWENTY-ONE

THE WOOLMINGTON MISDIRECTION

Brother, brother ; we are both in the wrong.
JOHN GAY, *Beggar's Opera.*

'MEMBERS of the jury, at about quarter-past nine in the morning of the 10th of December of last year, Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. Whilst she was engaged in that occupation she heard voices from the next-door house, No. 24. She knew that in that house her niece, a woman by the name of Violet Woolmington, was living. She could not hear her voice, but she knew that the woman was living there. She could hear, and she could recognize, another voice, and that was the voice of Reginald Woolmington, whom she knew quite well as the husband of her niece. She heard him say something to the effect, " Are you going to come back home ? " She could not hear the answer. Then the back door, the kitchen door, of No. 24 was slammed. She heard a voice in the kitchen. She could not tell you what it said. And then she heard the sound of a gun.'

Thus commenced a summing up that was to lead to days of hotly-debated legal argument, that was to be considered by no fewer than eight appeal judges, that was to clear English law of a two-hundred-year-old heresy, that was to carry the name of a Somersetshire farm labourer out wherever the common law is administered, and that was to lead to an event unprecedented in the legal history of this country—the freeing by the House of Lords of a man convicted of murder and sentenced to death.

To the lawyer the Woolmington case is a leading authority upon the seemingly arid subject of the onus of proof in criminal trials (I trust it will not seem so arid by the end of this chapter). To the layman it is an example of the swift and unexpected tragedy, the explosion of pent-up emotions, that unhappiness in the married state sometimes produces.

Reginald Woolmington was a Somersetshire farm labourer who in August 1934 had been married to his sweetheart, Violet Smith. He was then twenty-one and she seventeen. They lived together until the following November, when the girl-

wife left him and returned to her mother's house at Milborne Port, close to Sherborne. Why she left him was disputed; there had been quarrels, but their nature and extent were also disputed. There had been some disagreement over a perambulator which Woolmington's master had given them for their baby and which the wife had exchanged with a neighbour for another; and there was a suggestion of interference by the wife's mother, which was strenuously denied at the trial.

Whatever the reason, the wife left the husband, and the husband wanted anxiously to get the wife back. He went with his employer to plead with her, and he asked a lay-reader at Sherborne Abbey to write to her, but without avail. She was going to go into service, she said.

A fortnight later, on 9 December, Woolmington met his wife's brother in Sherborne. What the brother said to him is not known, but it was clearly something about the wife that induced the husband to take decisive action.

The next morning he took an old double-barrelled gun from his employer's farm, sawed off the barrels, loaded it with two cartridges, and went on his bicycle to the house at Milborne Port. There the events described by Swift in his opening words took place. When she heard the shot, Mrs. Brine ran to the front of her house in time to see Woolmington riding away on his bicycle. She hurried into the other house and found her niece lying dead on the floor, shot through the heart.

Woolmington was arrested soon after, and that evening at Wincanton police station he was charged with murder. Cautioned, he said, 'I want to say nothing, except I done it, and they can do what they like with me'. He added, 'It was jealousy, I suppose. Her mother enticed her away from me. I done all I could to get her back. That's all.'

In due course he came up for trial at the Taunton Winter Assizes before Mr. Justice Finlay. After a patient hearing the jury retired, and returned after eighty-five minutes to say that they could not agree, and even if they were kept there all night they would not agree. So the judge put the case back to be tried by his brother Swift at Bristol a month later.

The Assize Courts at Bristol had been gutted by fire shortly before this, and when Swift reached that city he found himself temporarily accommodated in the police court, and it was in that place that the hearing began for the second time, and for the second time Mr. Trapnell, K.C., and Mr. Reginald Knight conducted the case for the prosecution, for the second time Mr. J. D. Casswell (who has since become a K.C.) defended the

prisoner, and for the second time Woolmington went into the witness-box and told his story of how his wife had come to be shot.

What he said was this : that in order to bring his wife to her senses and persuade her to return, he determined to threaten suicide in front of her ; that he procured the gun for this purpose and sawed off the barrels in order that he could carry it under his coat ; that when his wife refused to return, he pulled the gun out from under his coat, and that as he did so it went off, how he did not know, and killed her.

Was this the truth, or had Woolmington deliberately shot his wife ? That was the problem before the jury. The prisoner was the only person alive who could relate what had actually happened, and the prosecution could call no witness directly to contradict his evidence. Nevertheless they contended that it was a concocted story, and they based their contention largely upon his actions after the shooting.

The prisoner had ridden home, where he said to his mother, ' I leave everything to Bill. I have been and shot Violet.' He had then gone to his master and told him, ' I shall not be coming to work any more. I have been and shot Vi.' He had again returned home, where he was seen searching in a writing bureau, after which he changed his clothes. He told his father that he intended shooting himself, but his father dissuaded him, and before long the police arrived. Afterwards his mother found in the pocket of one of his coats the following letter :

> ' Goodbye all.
>
> ' It is agonies to carry on any longer. I have kept true, hoping she would return. This is the only way out. They ruined me, and I'll have my revenge. May God forgive me for doing this, but it is the Best thing. . . . Have no more cartridges, only 2, one for her and one for me. I am of a sound mind now. Forgive me for all the trouble caused.
>
> Goodbye
> ALL.
> *I love Violet with all my heart.*
>
> REG.'

Woolmington said he wrote that letter after the crime, immediately before changing his clothes, and that he had obtained ink and paper for it from the bureau in which he had been seen searching ; he wrote it because he intended shooting himself. The prosecution, on the other hand, suggested that the reference to two cartridges showed that he wrote it before

the tragedy, and that it afforded evidence of his intention to commit murder as well as suicide.

Furthermore, they said, his leaving a woman whom he knew to be at least badly hurt and his subsequent statements pointed to the shooting being deliberate, and not, as he said, accidental. The prisoner's explanation of his conduct after the shooting was that he was upset, confused, and crying; and the police stated that he did not seem to understand the charge when it was read to him. The evidence of a gunsmith called by the Crown tended to support the defence of accident: he said that the barrel which was fired had a light pull, varying from two pounds twelve ounces to three pounds, as against the normal pull of four pounds.

When Swift came to address the jury he said: 'If you accept his [*i.e.* Woolmington's] evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position——'

Here he picked up the copy of *Archbold's Criminal Pleading* which was lying on his desk, and read the following passage from it:

'All homicide is presumed to be malicious, and murder, unless the contrary appears from circumstances of alleviation, excuse or justification. In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth.' (The last passage was quoted in *Archbold* from an old law treatise, *Foster's Crown Law*, published in 1762.)

Swift went on to paraphrase the quotation in his own words: 'If once you find that a person has been guilty of killing another, it is for the person who has been guilty of the killing to satisfy you that the crime is something less than the murder with which he is charged.'

The judge then went minutely through the evidence, and called attention to the possibility of a verdict of manslaughter.

His final words were: 'The Crown has got to satisfy you that this woman died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circum-

stances to be found in the evidence which has been given from the witness-box in this case, which alleviate his crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident.'

The jury were out for an hour and forty minutes. They found Woolmington guilty of murder, with a very strong recommendation to mercy on account of extreme youth. He was sentenced to death.

* * * * *

While the jury were deliberating, Mr. Casswell was thinking hard about Swift's direction. Was it right to say that the burden of proving innocence lay upon the prisoner? There were the words in *Foster's Crown Law*, and there they were reported in the law-books as having been used by judges before. But how did they square with the principle deep rooted in our law that a man is innocent until the Crown have proved him guilty? Mr. Casswell had long had his doubts about Foster's statement, but had never before been in a case which raised the point. The more he thought about it, the more strongly he felt, and finally he drafted a notice of appeal upon the bold ground that Swift's citation from *Archbold* amounted to a misdirection.

The judge met him shortly afterwards and said, 'Well, Casswell, I have been reading your notice of appeal: it seems that I don't know how to charge a jury in a case of murder!' Counsel diplomatically replied that he had twice tried to upset summings-up of Swift's and had twice failed, at which the judge prophetically observed, 'Never mind, Casswell, third time lucky!'

So the stage was set for the third act in this four-act drama. The scene that had shifted from Taunton to Bristol now shifted a month later from Bristol to London, to the law courts in the Strand, where the appeal was heard by that doyen of criminal judges, Mr. Justice Avory, and by Mr. Justice Lawrence and Mr. Justice Greaves-Lord.

Mr. Casswell argued that after Swift's direction the jury must have retired thinking that the only question for their determination was whether the prisoner had proved his defence of accident. They must have felt that they need not bother about the prosecution case, for the prisoner had apparently admitted all that the judge told them it was necessary for the Crown to prove. That, counsel argued, was wrong in law, for the onus of proof lay always upon the prosecution. He cited a number of decided cases in support of his contention.

Mr. Trapnell urged that there had been no misdirection. If there had, he said, the court could act under Section 4 of the Criminal Appeal Act.

This section of the Act setting up the Court of Criminal Appeal empowers the court to dismiss an appeal, even though they might think there was some flaw in the trial 'if they consider that no substantial miscarriage of justice has occurred'.

But, said Woolmington's counsel, the court could not possibly act under Section 4. There was no need to speculate as to what a jury, rightly directed, would have done; at the previous trial they *had* been rightly directed—and they had disagreed!

A layman might be pardoned for thinking this an irrebuttable argument. But it did not commend itself to Mr. Justice Avory: they proposed to take no notice, he announced, of what had occurred at the prior trial.

After a whispered consultation with his brother-judges, Avory began in his dry, crackling voice to give judgement. It was a curiously non-committal judgement. Avory seemed to support Swift's citation from *Archbold*, dismissing Casswell's elaborate argument with the phrase 'No doubt there is ample authority for that statement of the law'. At the same time his mind cannot have been free from doubt, for he also said, 'It may be that it would have been better if the learned judge had said to the jury that if they entertained reasonable doubt whether they could accept his [*i.e.* Woolmington's] explanation, they should either acquit him altogether or convict him of manslaughter only'.

Having thus in a few sentences refused either to approve or disapprove of the old law, the judge went on to discuss the facts, ending with these chilling words:

'We have come to the conclusion that, even if any such warning had been given to the jury about a reasonable doubt which is said to have been omitted, they must in the circumstances of this case have inevitably come to the conclusion that the prisoner was guilty of the crime of murder.

'In these circumstances we must dismiss this appeal.'

* * * * *

To many a convicted man those last five words, spoken in that place, have been the end of hope. But Woolmington had a pertinacious adviser. His counsel was still convinced of the force of the argument that Avory had swept aside so cavalierly, and there was still one loophole remaining through which his

client might escape from the web of the law. That was an appeal to the House of Lords.

It was a narrow loophole. There can be no criminal appeal to the supreme tribunal unless the Attorney-General certifies that the case involves a point of law of exceptional importance, and that it is desirable in the public interest that the appeal should be brought. Attorneys-General have always held narrower views than would-be appellants as to what is of public importance, and although there had been frequent attempts to appeal since this provision was made in 1907, the majority of them perished at the outset through inability to obtain the Attorney-General's fiat. There had in fact been only seven appeals during the intervening eighteen years, and there had been none at all between 1920 and 1934. However, Casswell submitted to the Attorney-General, Sir Thomas Inskip, that Woolmington's case should be an eighth, and at Sir Thomas's invitation went down to his room at the House of Commons to urge that here indeed was a point, if ever there was one, of exceptional public importance.

How crucial this question of onus of proof is can readily be seen from a hypothetical example. Suppose A stabs B and kills him. A is charged with murder, and says in defence that the stabbing was accidental. Now, if the jury are convinced that A's explanation is right, they must acquit. If they are convinced the explanation is wrong, they should convict. But suppose they cannot make up their minds? Here conviction or acquittal depends upon whether or not Swift was right. If in such case the burden lies, as Swift said, on the prisoner of establishing the defence of accident, then of course when the jury are in doubt he cannot have established it, and he must be convicted. If, however, the burden lies, as Casswell contended, on the prosecution of proving guilt, then, because the jury are in doubt, the prosecution case has not been made out, and there must be an acquittal. Upon the determination once and for all of the law on this question depended not only the fate of Woolmington, but also of countless persons who might hereafter face a charge of homicide.

Inskip saw the point. He granted the requisite certificate. And so a petition was prepared, praying ' such relief as to His Majesty the King in His Court of Parliament may seem meet ', and the scene shifted again, to Westminster, to the red-leather benches of the Lords' House, and on 4 April a strong court, presided over by the Lord Chancellor (Lord Sankey) and consisting of the Lord Chief Justice, Lord Atkin, Lord Tomlin, and Lord Wright, listened to Mr. T. J. O'Connor, K.C. (who had

now been briefed to lead Casswell), opening Woolmington's last plea. If this failed, there would be nothing left to hope for except the Home Secretary's clemency. . . .

For all that day and for the greater part of the next counsel argued, tracing the law of murder from pre-Conquest times through the works of commentators and text-writers and the decisions of judges down to the present day. There was no hurry: the emotional atmosphere of the Assize Court had vanished quite; and the proceedings seemed—as indeed they largely were—to be a pleasant intellectual exercise, a piece of academic historical research.

But there was one man present whose feelings can hardly have been soothed by the placid flow of well-knit argument. Reginald Woolmington was there, in the custody of a warder, watching, while five gentlemen in ordinary morning clothes—much less impressive they must have seemed than the robed, bewigged judge who had tried him so far away in Bristol—decided a great principle of English law which, quite accidentally it seemed, was going to determine his fate. Who knows what his feelings were as old musty books were cited and scanned, as long words he could not understand rolled round the quiet council-chamber? Did he reflect upon the inscrutable working of a fate that had decreed a shot in a Somersetshire kitchen should bring him here into the very holy of holies of the British Constitution? Was he imbued with respect for the law which afforded his case such careful trial before so many tribunals, or with puzzled hatred of the law which could pin his life upon the correctness of a phrase written by Sir Michael Foster in the reign of George III? Did he feel an impulse to rise and cry out against the intolerable strain of waiting, waiting, waiting?

Lord Sankey sympathized with the prisoner's feelings, for when at the close of the second day he said that their Lordships would deliver judgement later, he announced also what their decision was.

The decision was that the conviction would be quashed, and Woolmington might go. He walked out of the Palace of Westminster a free man.

When six weeks later the Lord Chancellor came to deliver his judgement (with which all his colleagues concurred), he spoke words destined to be learnt by every law student for generations to come: 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . . If at the end of and on the whole of the case there is a reasonable doubt . . . the prosecution has not made out the case and the

prisoner is entitled to an acquittal. . . . The principle that the prosecution must prove the guilt of the prisoner is part of the common law of England, and no attempt to whittle it down can be entertained.'

Swift's summing up, said Lord Sankey, was wrong, and if Foster's text and the past decisions to the same effect meant the same thing, they were wrong too. There had been a misdirection, and the conviction must be quashed. This was no case for the application of Section 4: 'We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion'.

* * * * *

At first sight it seems easy to criticize Swift for his mistake. But when the facts are properly considered it will be conceded that he cannot be blamed for thinking the law to be as he put it. Firstly, it was so stated in *Archbold*, and *Archbold* is the criminal lawyer's gospel. Secondly, it was so stated in the authorities correctly quoted in *Archbold*. Thirdly, it had often been so stated by many counsel and judges—the reader who turns back to the Fahmy case will find it adopted by Sir Percival Clarke.[1] Lastly, it had been so stated by Swift himself in summings up which had been approved by the Court of Criminal Appeal: he had, in fact, used what may be termed 'the Woolmington misdirection' in the past whenever the facts warranted it. In the Robinson case, for instance, he said, 'To kill anybody in this country is to be regarded as murder unless and until the person who has done the killing can satisfy a jury that it is something less'.

In truth the law to all intents and purposes *was* as he put it, until the House of Lords said it wasn't. That well-known encyclopaedia, *Halsbury's Laws of England*, gives the Woolmington misdirection as being the law. (Ironically, the section of that work containing this assertion was contributed by Mr. Justice Avory.) Indeed, instead of blaming Swift it would be easy to praise him for putting the proposition so clearly—nay, baldly—that it could easily be isolated and tested by appeal. But praise would be as unmerited as blame: this great decision —perhaps the most important criminal case of modern times—arose out of a combination of circumstances of which the judge's phrasing was only one. Before it could be reached there had to be the shooting at Milborne Port, the disagreement of the first jury, the words in the mouth of the judge, the doubt in the mind of counsel, and the prisoner's ability to sustain

[1] *Ante*, p. 120.

expensive proceedings. In such fortuitous ways does the unwritten law of England develop.

If Swift cannot be fairly criticized, that is not to say that criticism cannot be made. Is a legal system satisfactory in which such fundamental points are left undecided, or wrongly decided, until a prisoner chances to come before the courts with a long purse and courageous advisers? Suppose Woolmington had not appealed? Suppose his counsel had said, 'There's the law in *Archbold* and *Halsbury*: let the matter drop'? A further, and very unpleasant, thought arises: suppose Robinson had appealed to the Lords?

Woolmington, of course, had not a long purse. He was fortunate enough to be earning only thirty-three shillings a week—fortunate, because it is another of the ironies of 'old father antic, the law' that a richer man in his position might have been reduced to penury by the costs involved, while he, thanks to the change made in 1930 in the Poor Prisoners' Defence Acts, had his defence provided from the outset at the expense of the State. This beneficent extension of free legal aid may be set off against any criticisms the case may engender —how beneficent it is may be emphasized by comparison with the Mason trial. Another item to the law's credit was the celerity with which the case moved: the shooting was in December, the trial in January, the re-trial in February, the appeal in March, and the appeal to the Lords in early April.

Judges are human beings and, human nature being what it is, it would be understandable if a judge cherished some bitterness towards the man who had demonstrated his error in so spectacular a fashion. But Swift never bore a grudge, and Mr. Casswell has told the present writer that 'after the decision, so far from bearing me any ill-will, he rather went out of his way to be helpful to me whenever I was before him. I always thought that this was typical of his generous nature.'

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The House of Lords twice dealt with homicide in 1935, and by a coincidence Swift was concerned on both occasions. The second was the trial of Lord de Clifford at Bar for manslaughter: Swift was one of the four justices chosen to assist the lords spiritual and temporal at this trial, and thus had the piquant experience of sitting as a judge in the very chamber that had a few months before overthrown his views of homicide. It was 12 December when he went down to Westminster with his brethren Branson, Charles, and Goddard JJ., to take part in this most unusual trial.

The trial of a person of ennobled blood by his peers for felony is a proceeding rarer even than the sparse criminal appeals with which we have been dealing. Peers as a class seem to be singularly well behaved, and it is less than twice a century on an average that they are detected in the commission of a felony. The last case had been that of Earl Russell, convicted of bigamy in 1901, and with no more recent precedent than this it was not surprising that the majestic pageant of the de Clifford trial creaked a little in places. The Serjeant-at-Arms lost his place in the rubric during the appointing of Lord Hailsham to be Lord High Steward, and commenced to summon the accused to the Bar. But ' this interruption having been hastily suppressed, their lordships recovered the thread of the drama '. The prisoner had learnt his part well, and when asked how he would be tried replied ' By God and my peers ', but the formula which should have followed this—' God send your lordship a good deliverance '—was forgotten. There was a moment of supreme anti-climax after Lord Hailsham had demanded, ' Is it your lordships' pleasure that the judges have leave to be covered ? ' and the assembled lords had courteously answered, ' Aye, aye '. Every one waited, but—nothing happened. Either the judges had not brought their caps or else delicacy restrained them from donning the headdress which they ordinarily put on only for the passing of the death-sentence.

The charge against Baron de Clifford arose out of a fatal motor accident on the Kingston by-pass. Never before had there been such an array of counsel in a motor case: the prosecution was conducted by the two law officers of the Crown, Sir Thomas Inskip, K.C., and Sir Donald Somervell, K.C., assisted by Mr. Eustace Fulton (now Chairman of London Sessions) and Mr. Christmas Humphreys, while the noble lord was defended by Sir Henry Curtis-Bennett, K.C., and Mr. E. Ryder Richardson.

At the close of the prosecution evidence Sir Henry submitted that there was no case to answer. The lords withdrew to consider this, and determined to take the advice of the judges. Swift and his three judicial brethren consulted together, and all agreed with Sir Henry's submission. Swift accordingly reported that in the unanimous opinion of those of His Majesty's judges who had been summoned to attend the trial there was no evidence of criminal negligence which the prisoner should be called upon to answer.

After that all the peers solemnly voted ' Not Guilty, on my Honour ', the prisoner was discharged, the peers marched out

in somewhat straggling procession, and the trial of Lord de Clifford was found to have ended.

Swift was delighted at the pageantry of the trial, and gratified at being accorded the honour of heading the judges who went to sit in their rightful constitutional place upon the Woolsack with the Chancellor. His appreciation was heightened by his realization that he was taking part in what might well be the last of this series of trials springing from the Magna Charta right of a man to be tried by his peers. At the time it was felt that abolition of this cumbrous and antiquated procedure would not be long delayed, and even the Chancellor admitted during that week that the ceremony had outlived its usefulness. But a Bill introduced to abolish it failed to pass, and now that the case has left the public mind nothing will be done, no doubt, until the day comes when some impoverished peer descends to stealing a pair of boots. Then perhaps the incongruity of so ponderous a machine being set in action to crack so small a legal nut may stir the legislature to action.

Meanwhile the House of Lords still acts as a court of first instance as well as the supreme appellate tribunal. In the second capacity it condemned Swift's summing up; in the first it deferred to his advice. Such are the occasional anomalies of the English constitution.

CHAPTER TWENTY-TWO

THE NORTHERN CIRCUIT

'Law students should be taught how to stand up, how to speak up, how to dry up, and how to shut up.'

TWO days after the House of Lords gave judgement in the Woolmington case, Swift received the degree of Doctor of Laws, *honoris causa*, from Liverpool University. The convocation was held in St. George's Hall, and the degrees were conferred by the Chancellor of the University, Lord Derby. When the judge stepped back after the ceremony, the great crowd of vociferous undergraduates rose and sang :—

He's a laddie fra' Lancasheer,
From t'King's Bench Division he comes to us here.
Here's thy degree, Sir!
Thou canst sign LL.D., Sir!
St. Helens and Wigan will cheer!

None of the tributes he received afforded Swift greater pleasure than this. 'Whatever I am,' he had said in 1920, 'can be summed up in one word "Liverpool",' and now in 1935 the city that had nurtured him had paid him this honour. Moreover the place of its bestowal was singularly apt. St. George's Hall was more familiar to him than any other building in the land; he knew its stones as well as he knew his drawing-room fireplace at 'Kiona'. Its steps had been ascended by the hastening feet of the young law student, by the eager tread of the rising junior, and by the slower paces of the robed judge of Assize, walking in procession as the tabarded trumpeters sounded 'God Save the King!'. Now in another procession, in robes still—the unfamiliar academic robes—he trod the well-worn path, and within the Hall they were waiting to do him honour. There were tears in his eyes.

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Swift's love of Lancashire took him often back to the County Palatine. He went back on visits to his old friends and to dinners of the Liverpool Law Society. He went back in that great year of his, 1929, to present the prizes at Lancaster Grammar School. ('I am a commercial traveller in justice,'

he told the boys.) He did the same the next year at Wigan Grammar School, when he begged three days' holiday for the scholars—'It will be the only time that most of them will appear before a Recorder of Wigan, and if he can't give them three days, who can?' Most of all, he went back in the course of his duty. He took both the Spring and Summer Assize on the Northern Circuit in 1921. He went the famous Summer Assize in 1922 with the new Lord Chief Justice as his companion; Lord Hewart had then been but three months appointed, and had chosen his old circuit for his first Assize. Lancashire had responded, and the circuit was a triumphal progress. Swift went the Winter Assize in 1924, and afterwards took that Assize in every second year.

Thereafter the early months of each even-numbered year would find him sitting at Appleby and Carlisle, at Lancaster, Liverpool, and Manchester. The biennial pilgrimage became part of his life, and when he fell ill with his fatal illness he was looking forward to the Winter Assize of 1938. It was not merely the sights and scenes of his youth that called him back like this. It was not merely the satisfaction of being home. Perhaps the greatest incentive for his recurring visits was that through them he could again participate in the corporate life of that fraternity with which his whole career had been bound up, the Northern Circuit Bar Mess.

A judge upon his appointment ceases formally to be a member of his old circuit mess, but of course he cannot slough off the associations of twenty years or more. Swift had always taken an especial interest in circuit affairs, and his retentive memory had become a storehouse of circuit traditions. These, and his love of his old haunts, and his loyalty, and his humour, and his talent for friendship—these things combined with his recurring visits to lead him insensibly into an unusual and possibly unprecedented relationship with his old circuit. He watched the Lancashire Bar like a father. He kept up his old professional friendships, and made it his business to know the younger barristers. Those staid Victorian mansions, Newsham House and Lancaster House, the judges' lodgings of Liverpool and Manchester, rarely knew such entertaining as when Swift J. was on Assize, and conversely on these occasions the circuit's dinners to the judges will live long in the annals of the Liverpool and Manchester Bars. In court Swift could look down on the counsel's row where he had so often sat and see there his old and new friends. He knew their careers, he knew their chambers, he knew their clerks, he knew the solicitors who briefed them, and he had a good idea what was written in their

briefs and passing through their minds. Keeping thus close, always happy to retail the old circuit stories or hear new ones, to give help and advice to the circuit and its members, Swift became for them as the years went by a kind of unofficial leader and mentor, a living patron saint. Elsewhere he came to symbolize the Northern Circuit, and on that circuit itself he became an arbiter of customs and of advocacy.

Particularly of advocacy. The methods of practising this difficult art vary in different parts of the country, and I think it can be said without offending other quarters that upon the Northern Circuit there has always prevailed a high standard both of skill and of professional honour. Swift, with his almost passionate interest in the art, came gradually to adopt the rôle of conservator, as it were, of Northern Circuit advocacy. In all the circuits it came in time to be noticed that if he saw something slipshod or second-rate, his pencil would tap the desk and the offending barrister would either find himself confounded by a softly-put but unanswerable question, or would be led into a subtle dialogue at the close of which his error would suddenly become apparent both to himself and to the court at large. On the Northern Circuit Swift went further, and pointed out or reproved or discussed matters which, though quite correct, did not accord with his own canons of advocacy. They were good-humoured exchanges generally, these passages between Bench and Bar, and sometimes, it must be confessed, they seemed to arise from no other source than the judge's twinkling high spirits, or even a boyish desire to 'pull the legs' of his old colleagues.

Certainly his methods achieved results: no member of the circuit ever went before him with his brief unread, and his long series of recurrent visits played a part which the circuit to-day gladly acknowledges in preserving its standard of advocacy. And the Bar never complained: they knew their Rigby and loved him, and they knew why he laid his little traps, and they delighted, and still delight, to tell the stories of the success or failure of the judge's sallies. For sometimes they failed—and no one was happier than the judge when he found someone to answer him back, to stand up to him and try to turn the dialectical tables. Courage is one of the advocate's greatest allies, and Swift was happy when he found before him someone possessed of that resource in the face of an apparently hostile tribunal. Once he thought a certain barrister was becoming too diffuse in his cross-examination. *Tap-tap.* 'Where are we getting to *now*, Mr. Pritchard?' he inquired with feigned weariness. 'About the middle of my cross-examination, my

IN LANCASHIRE, 1928

Swift leaving the Judges' Lodgings, Liverpool, with the High Sheriff of Lancashire and Mr. Justice Wright (now Lord Wright)

IN LANCASHIRE, 1910

Mr. and Mrs. Rigby Swift on an election tour at St. Helens

Lord,' was the smooth answer. Swift liked telling that story.

That the Northern Circuit understood the judge's methods may perhaps be deduced from a poem which was recited in the circuit Mess one Grand Night. It now reposes in the circuit archives. For reasons which the reader may appreciate it is called *Horatius*. It commences :—

Sir Philip Swift of Liverpool
By his black cap he swore
That the great Northern Circuit
Should live in peace no more.
By his black cap he swore it
And nam'd Commission Day,
And bade Bill Graham,[1] give it forth
That he was shortly coming north,
And with Macnaghten J.

The poem goes on to describe the consternation caused in Liverpool by the news :—

And all around the city
The Stuffs stopped up the ways,
Discussing what might be their fate
Before a few more days.

The judge's terrifying arrival is next described, and then how a hero was found who with two more to help him undertook to meet the foe :—

Meanwhile the mighty Rigby,
Right glorious to behold,
His clerk and marshal following,
Came in like some great Eastern King
And made my blood run cold.
Full fifty heads were lower'd
Before that great grandee,
Who took his seat amid much dread
All robed in robes of blood-like red,
And fixed his flaming eyes ahead,
Where sat the dauntless three.

And then began a battle
The like of which, I ween,
Has ne'er before on Mersey's shore
Or any shore been seen.
Down went the gallant * *
And down went * * *
And fighting for a felon *
* yielded up his life.

When, at the judge's orders,
Their bodies were removed,
He fiercely turn'd on * and said
' Convictions must be prov'd,

[1] Mr. William Graham, Clerk of Assize, Northern Circuit.

And let it now be known abroad
Throughout all Liverpool
That, while I'm here, work must be done
With care, and not as though for fun;
And mark my words; for any one
Who thwarts me is a fool.'

At this the learned counsel,
Who hadn't read his brief,
Felt rather like a ship must feel
When stranded on a reef;
But with his colours flying
Right gallantly he sank,
And * * * * took his place
In the foredoomed rank.

On seeing * * * *,
Sir Philip's noble brow
Frown'd such a frown that in my dreams
I seem to see it now.
Before a word was spoken
He issued a decree
That * * should be taken far
Beyond the lightship at the Bar
Where sharks and monster fishes are
And hurl'd into the sea.

The judge's services to the members of his old circuit were far from being confined to criticism. Many stories could be told of his kindnesses towards the barristers of Lancashire, his timely gifts to those overtaken by misfortune, his sponsorship of those seeking preferment, his advice to those perplexed. No one of them turned unsuccessfully to him for help, and help not infrequently came when quite unasked for. I have permission to quote the following passage from a letter written to Swift by one who had recently taken silk. The judge sent his congratulations, to which the new K.C. replied in this letter. After thanking the judge, he went on to recall a case some years earlier in which Swift had asked him to defend a certain offender. He continued :—

'I had then been five years at the Bar, and I was getting awfully depressed. Things didn't seem to be going the right way at all; and I believe that if anyone had offered me a job of some kind, I would have left the Bar.

'After the case was over, you asked me to lunch, and after lunch you said some words of encouragement to me which gave me new hope and determination, and which I shall never forget, and for which I have never ceased to be grateful.'

* * * * *

On rare occasions Swift's vigilance led him to overreach

himself and to deliver an unmerited rebuke. When he did this he always made amends. Once his old colleague Mr. O. G. Morris wrote pointing out to him that a wigging given to one counsel for failing to supply certain information was undeserved; the barrister was not in the position to supply those facts. Swift, addressing Mr. Morris in open court next day, thanked him for his letter, and requested him to convey his apologies to the counsel in question.

That was characteristic. Swift was usually ready to speak his mind, and to speak it bluntly. A plaintiff once complained that he could not understand his writ. Swift: 'Neither can any one else. If you get a bill from your solicitors asking for payment for drafting that writ you are not to pay it. You can tell them that I said so. It is the biggest muddle that I have ever seen.' Now, things of that sort spoken in haste are sometimes repented at leisure, and realization of that fact deters many from hot extempore words. It did not deter Swift. His wrath was as generous as his praise, and when he felt indignation he said so in a robust manner heard more often a century ago than to-day. If this trait led him too far, no false pride stood in the way of his making amends, as the incident of Mr. O. G. Morris's letter shows.

He was noticeably more outspoken on the Northern Circuit than elsewhere. In London there were chill currents that sometimes dimmed the warm fires of his generous indignation and full-bodied humour. There were some few in London who could look at Swift through fastidious eyes and see rudeness in his bluffness and bad manners in his outspokenness. They were few, but they did exist—and indeed it is not difficult to understand how upon occasions a cultured man could be offended by the Lancashire judge's direct and homely utterances. Swift cared little what others thought of him; his positive, extraverted personality would not feel its stature lessened by another's dislike.

In one way, however, he was influenced, not by a handful who might be thought to dislike him, but by his many friends with whom he found there was one intimacy he could not share. The majority of barristers are Oxford or Cambridge men, and the *cameraderie* of the Bar owes not a little to its being for many a continuation of the *cameraderie* of the university. To this most sociable of men the good-fellowship of the profession meant much, and he came to regret that there must always be lacking in his intercourse with his fellows the bond and background which it is the exclusive privilege of the older universities to confer. He felt this regret after he had come to

London, and he felt it more keenly after he had, as circuit judge, visited the university towns and seen from within something of the sources of their influence.

To the writer this regret of his seems itself a matter for regret. Certainly a Swift who had approached the Bar by the conventional educational channels would have left less vivid material for a biographer. Oxford or Cambridge would have erased his accent and deprived his background of its refreshing novelty. He might have lost his charm; he might have lost more—for too often the university veneer serves to insulate its wearer from sympathy with the man in the street. Difficult as it is to believe that any influence could diminish Swift's native insight into the plain man's mind, he might have been so affected. He might even have learnt that it was bad form to make a fuss. No, to the writer's mind, the judge's background played a major part in ensuring his early success at the Bar and his independence and strength on the Bench. In a profession where public school and 'varsity men are two a penny, there is a ready opening for the first-class man with a difference in manner and outlook to put at the command of the solicitors who employ him. It is worthy of note that two others among the best known of modern judges had no university training; Lord Darling was almost entirely self-taught, and Lord Reading sailed before the mast while his contemporaries were at school and was a stockbroker's clerk while they were up at Oxford or Cambridge.

This influence may, however, account for his never having identified himself, in the way he had with the Northern Circuit, with the other barristers' corporation to which he belonged. He was a member of the Honourable Society of Lincoln's Inn from the day of his call; he became a Bencher in 1916, and but for his untimely death would have in due course have been Treasurer. (He was Master of the Walks in 1937, and as such received H.R.H. the Duchess of Kent upon her visit to the Inn's garden party of that year.) He was happy in the Inn—he was happy anywhere where he could be with barristers and talk shop—but he was never an outstanding Lincoln's-Inn man in the way in which he was an outstanding Northern-Circuit man.

One or two more may be selected from the many instances of Swift's outspokenness on his native heath. Once at Lancaster he tried a woman for murder. The circumstances were as pathetic as the evidence was meagre, and he invited the jury at the close of the Crown case to stop the trial. The jury demurred and the case proceeded. This was the judge's

summing up: 'Members of the jury, convict this woman if you dare, and reconcile it with your conscience hereafter. Consider your verdict!'

In February 1934 he had a doctor in the Liverpool witness-box stating that a motorist had been drunk. The doctor had examined him at a police station.

'By what right did you examine him?' demanded the judge.

'He was told I was a police surgeon and he expressed no unwillingness.'

The incongruity underlying that answer angered Swift. Addressing prosecuting counsel he said:—

'What startles me is the way people come along and say they examined somebody, put him through various tests, and then, finding him too drunk to understand anything which has been going on, certify him drunk. I don't know of any right to do such a thing. . . . I object to these inroads on British freedom. The police have no right to apply tests to a man like the prisoner without his consent. If they say he is able to give consent, then they have no business to come here and say he is drunk, because drunkenness destroys consent.'

Mr. Isaac Foot asked a question in the House about this case. It obviously raised an acute issue between the right of society to be protected against drunken drivers and the right of individual liberty. It is attractive to espouse the former right, and the M.P.'s who spoke clearly did so. But it is significant of Swift's hardy individualism both that he criticized an excess of their powers by the police and that he said so bluntly, unmindful of what M.P.'s or any one else might think.

The same trait led him to a passage with the Manchester magistrates in 1928. He was trying divorce there when he found that a husband-petitioner had been to prison for failing to support his unfaithful wife. He said: 'The more I sit in these courts where the petitions of poor persons are brought, the more startled I am with the ease with which an unfaithful wife appears to get an order for maintenance in the police courts, and then a perfectly respectable husband finds himself in prison because he cannot pay. It is perfectly shocking to me to see the number of people who seem to go to prison because they cannot maintain their wives. . . . Some people send others to prison very lightly."

Experience prompted him to add: 'However, let us not inquire into matters which are no business of ours. We shall only be told to mind our own business.'

He was. The Manchester justices were stung to take the same unusual course as the Surrey justices in 1924[1] and to issue a formal reply from their Bench. They were angry; Swift's remarks, they said, amounted to censure, and they regretted he had not made inquiries first—'if only as a matter of courtesy'. Nor had they sent a wronged husband to jail: 'if he is in a position to prove that his wife is unfaithful, it is not the practice of the justices to make any order for payment to the wife'.

From other quarters Swift's words received warm commendation. They were widely read, and drew attention to a surviving anomaly in the law of imprisonment for debt. The largest single category of the 2,419 debtors whose presence in Brixton Prison so shocked the judge on another occasion[2] were defaulting husbands. Every lawyer knows that if a man owes his tailor £20 it is next to impossible to get him committed to prison, but that if he owes the same sum to the ratepayers for the support of his wife, the task is relatively easy. If the situation has improved of recent years, it is due to the urgings of Rigby Swift and those who shared his views.

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Many of the best-known of the 'Swift stories' that circulate so freely among lawyers had their origin on the Northern Circuit. Once that celebrated Lancashire advocate, the late lamented Mr. J. C. Jackson, K.C., applied to him to sanction the payment of a certain sum in settlement of a claim by a small girl whose leg had been injured in an accident. Having satisfied himself that the sum offered was commensurate with the injury, he said:—

'Having seen the leg, Mr. Jackson, I approve the sum you mentioned. When two experts like you and I see a leg, we are bound to be in accord.'

The best known of all the Swift stories concerned the same counsel. This anecdote has been told so often as to acquire many different forms, and even those who claim to have witnessed the incident do not agree upon the true version. What happened was something like this. Jackson was in court at Manchester one day while a young barrister made his concluding address to the judge. Every one except this barrister appreciated that Swift was in his favour. Counsel

[1] *Ante*, p. 76. [2] *Ante*, p. 75.

droned on until Jackson, whose case was next in the list, passed him a note saying : ' Sit down, you b—— fool ! Can't you see the old —— is with you ? ' Counsel glanced at the note and sat down.

Swift : ' May *I* see that note ? '

Counsel (embarrassed) : ' It is a personal note to me, m'lord, from Mr. Jackson.'

Swift : ' Mr. Jackson, have you any objection to me seeing the note ? '

Jackson : ' Not at all, my lord.'

In tense silence the note was handed up. The judge read it, and passed it back. Then he said :—

' A very proper note. I quite agree with it.'

This story is now usually told with a different but certainly inaccurate ending. It is said that counsel failed to obey Jackson's hint and continued his interminable address. Presently the judge stopped him, asked to see the message, and upon being handed it asked counsel :—

' Have you read this note ? '

' 'Er—yes, my Lord.'

' Well, read it again ! '

No one hearing Swift speak could ever mistake him for a Southerner. Once at Manchester counsel appealed to his knowledge of some Lancashire custom. ' No, Mr. E——, you must not rely on that. My county is Sussex ! '

His accent lent point to many of these stories, among them this one, which happened at Lancaster. Counsel was urging the claims of an elderly plaintiff who was suing an even more elderly defendant for breach of promise. He was reading a saccharine verse from a Christmas card sent by the swain when halted by pencil taps from the Bench.

' I fear, Mr. Blackledge, that you are but a poor ambassador of love.'

' Don't you like my reading, my lord ? '

' No ! '

And no spelling can counterfeit the Swiftian tones in which the judge added : ' It lacks—*passion !* '

* * * * *

It is not only in the courts that the judge's presence is remembered, and it is not only his forthrightness and his wit that live on in North-Country memory. Dean Dwelly, of Liverpool Cathedral, recalls an incident illustrating that little-appreciated facet of his character, his piety. (It was at that cathedral, incidentally, that Swift once arrived for the Assize

service to find that the judicial entry coincided with the singing by the choir of '. . . slow to chide and *swift* to bless . . .' This *may* have been a coincidence, but those familiar with Dean Dwelly's skill in stage management at his cathedral will doubt this.) The Dean's story is of the special service in 1936 commemorating the centenary of the Liverpool police force. The judge was asked to read the second lesson, and himself chose the first part of the fifth chapter of the Gospel according to St. Matthew—the Sermon on the Mount—which in fact he knew by heart. The passage closed with the words, ' Let your light so shine before men that they may see your good works and glorify your Father which is in Heaven '. After that everyone expected, ' Here endeth the second lesson '. Instead Swift paused, and then gave three taps on the lectern. Amid a tense silence he repeated, ' Let *your* light so shine ! '

The effect, says the Dean, was electrical.

CHAPTER TWENTY-THREE

THE MONGOOSE CASE

Great oaks from little acorns grow.
OLD SAW.

TRUTH, we are from time to time reminded, is more strange than fiction. The lawyer more than any other is in a position to endorse this adage, for the cross-sections of real life continually being laid bare in the courts are often compounded of such startling unlikelihood and such flagrant coincidence that no novelist would dare to employ them. The 'mongoose' trial, which came before Swift a few months after his last visit to his old circuit, is a case in point. None of his trials embraced a greater concatenation of improbabilities, and its coincidences bred a suspicion which it required a departmental inquiry and a parliamentary debate to dispel. Its antecedents seemed totally unrelated. In the main they were three in number: firstly, the well-known investigator of psychical phenomena, Mr. Harry Price, went to the Isle of Man to investigate a claim by a Manx farmer to be in touch with a ghostly mongoose which was eighty-six years old, could say nursery rhymes, and could sing songs by the Spanish Jews of Turkey; secondly, there was a dispute or difference of opinion upon the board of governors of the British Film Institute, a semi-official body for encouraging educational and cultural films; thirdly, there was a luncheon-party on 7 February 1936 at the Carlton Club, at which were present a former chairman of the London County Council and a senior official of the British Broadcasting Corporation. Of these elements was the great slander case of *Lambert* v. *Levita* compounded.

The connecting link lay in the person of Mr. Richard Stanton Lambert. Mr. Lambert had been for nine years employed by the B.B.C., most of the time in the capacity of Editor of the *Listener*. He had accompanied Mr. Price to the Isle of Man, going at the latter's request as a disinterested witness, and he had collaborated with Mr. Price in writing an account of what they found there in a book entitled *The Haunting of Cashen's Gap*. He was one of the governors of the British Film Institute, holding this office with the B.B.C.'s permission, and had taken a strong line in the dispute mentioned above.

He was not present at the Carlton Club lunch, but he and his actions were the reason for it taking place.

And that entertainment was the central feature of the case, the Sarajevo at which the legal war broke out, for at that lunch-party words were spoken by Lieut.-Col. Sir Cecil Levita, K.C.V.O., C.B.E., to Mr. William Ewart Gladstone Murray, which were to cost the former the sum of £7,500.

To follow the case it is necessary to understand what led up to the luncheon. Sir Cecil Levita had always taken an interest in the cinematograph industry, and his wife was another of the governors of the British Film Institute. In 1934 some activity of Mr. Lambert's roused the antagonism of the film trade, and it was feared that efforts might be made to induce the B.B.C. to withdraw their consent to his acting as governor. He was then on cordial terms with Lady Levita, and Sir Cecil took the matter up on his behalf with the B.B.C., and had an interview with Mr. Gladstone Murray. (Mr. Murray was then the Corporation's Director of Information and Publications and head of Mr. Lambert's department; before the Carlton Club lunch he had become Assistant Controller, his former duties having been taken over by Sir Stephen Tallents, who had been made Controller of Public Relations.) Whether the B.B.C. would have withdrawn consent is not known, but evidently Mr. Lambert thought they might, for in his letter of thanks to Sir Cecil he wrote, 'I am sure that, but for your weighty intervention, I should have had to send in my resignation by now'.

That was in December 1934. A year later Mr. Lambert's relations with the Levitas had greatly changed. The dispute among the governors was taking place, and Mr. Lambert and Lady Levita were in opposite camps. Because of what he heard of the dispute, Sir Cecil arranged the luncheon with Mr. Gladstone Murray, in order, as he wrote to the latter, 'to continue a conversation of some months ago'. What was said at that repast was disputed: Sir Cecil said that he went to inform Mr. Murray that he, Sir Cecil, must withdraw his 'sponsorship' from Mr. Lambert. Mr. Murray said that Sir Cecil had accused Mr. Lambert of being mad.

* * * * *

Less than nine months after the crucial luncheon Sir Patrick Hastings stood up in Swift's court to open Mr. Lambert's case to the jury. With him were Mr. Valentine Holmes and Mr. J. Senter, and against him were Mr. Tristram Beresford, K.C., and Mr. Gerald Gardiner. 'You may come to the

conclusion that this is a very, very grave and serious action.' That was the note Sir Patrick struck at the outset. He went on to tell the jury what the alleged slander was. Sir Cecil, he said, had told Mr. Murray that Mr. Lambert had apparently been induced to believe in occultism, that he believed in a talking mongoose, and that he had moved his house several times because of pursuit by the Evil Eye; that his judgement was so faulty as to make him incapable of remaining a governor of the Film Institute, and that he had been guilty of glaring inconsistencies, some of which were instanced; that he ought not to continue as a governor and that, as there was a difficulty in removing him, he being a life governor, the B.B.C. ought to withdraw their consent to his so acting. The real gravamen of the slander, concluded Sir Patrick, was that ' Sir Cecil Levita was saying in terms " This man is cracked; he has got to go," and he is saying " If you, Mr. Gladstone Murray, don't yourself go to the B.B.C. and get Mr. Lambert removed, I, Sir Cecil Levita, will go to them myself," and you will hear in a moment whether he did or not.'

Counsel turned to what later became so important, the events behind the scenes following the luncheon. Mr. Murray had told Mr. Lambert what had occurred, and four days after the alleged slanders the latter wrote to Sir Cecil asking for an apology. In reply he received a formal letter from Sir Cecil's solicitors. Mr. Lambert wrote again, and then went to his solicitors, who reiterated the demand for an apology. They received a reply termed by Sir Patrick ' one of the most amazing letters that can well have been written. It said, " We understand that the matters to which you refer are being discussed to-morrow by high officials of the British Broadcasting Corporation, and we suggest that the matter should wait over until after this discussion has taken place ".'

What that letter meant, thundered Sir Patrick, was this: ' Our client has been guilty of a grave attack on you. For a long time past you have been asking for an apology. Our client has meanwhile been trying to probe it still further even by going to the B.B.C., and we are not going to tell you whether he will apologize or not until we find out whether he has succeeded in getting you dismissed by repeating the lies which he has already told.' ' I know of no other meaning to that letter,' said counsel.

Strong meat this! The pencils of the reporters flew over their papers, and a larger and larger crowd packed into Swift's court.

Two days later, continued Sir Patrick, Sir Cecil wrote saying

that though he did not admit the accuracy of the statements attributed to him, ' nevertheless in so far as I may have repeated any gossip told to me concerning you I unreservedly apologize for so doing '. The apology was deemed inadequate, and thereupon the writ was issued.

Counsel's speech was followed by Mr. Gladstone Murray's evidence. Before the trial Mr. Murray had sailed for Canada, and his testimony had therefore been taken beforehand and a shorthand note of it was read. This evidence bore out counsel's account of the words spoken and added, ' Sir Cecil appealed to me—using the expression " as a man of the world "—to do what I could to arrange this matter to his satisfaction. He repeated the statement about the house being changed because of pursuit by the Evil Eye, and as he repeated it he used the conventional sign, tapping his head, to indicate lack of mental balance. Nevertheless he emphasized that he wished to make it clear that he did not wish to reflect on Mr. Lambert as Editor of the *Listener*.' Sir Cecil had also said that if Mr. Lambert continued a governor of the Institute, he, Sir Cecil, would have to go to Mr. Norman, the Chairman of the B.B.C.

The plaintiff then entered the box. He said that since the date of the alleged slanders the attitude of the B.B.C. towards him had altered unfavourably, and that in the last year he had been passed over for the customary salary increase, although all other members of the *Listener* staff had received increases.

Gef the mongoose entered the proceedings in Mr. Beresford's cross-examination of the plaintiff. This entertaining animal, so it appeared from *The Haunting of Cashen's Gap*, was alleged to have some knowledge of Russian, Manx, Hebrew, Welsh, Hindustani, Flemish, Italian, and Arabic, to take a great interest in flying, to practise the tonic-sol-fa scale, to be able to transform himself into a cat, and to have killed 118 rabbits, being careful, however, not to do so out of season. To these attributes must now be added the ability to influence litigation and to set London laughing. Gef came into *Lambert* v. *Levita* because one of the defences to the action was justification—i.e., that what was said was true—and one of the props of this defence was the belief which, Mr. Beresford suggested, Mr. Lambert had in the occult. It was put that in his book, which he himself had described in the preface as ' an essay in the Veracious but Unaccountable ', he had shown his belief in the supernatural. This he denied. He thought Gef was a fraud, he said. Passages were being put to him when Swift intervened.

'The last thing in the world which anybody wants to do is to be rude to an author about the creation of his brain, but—isn't this book nonsense?'

That somewhat stymied a cross-examination urging that the book was written in all seriousness, and thereafter the mongoose incident degenerated into buffoonery. Swift had evidently made up his mind that the jury must not take the book as justifying the slander alleged. 'Tell me,' he remarked, after the plaintiff had confessed to never having seen Gef in the flesh, 'when you went to the Isle of Man did you see three legs, and did you see any cats without tails?'

Witness was understood to reply that he had seen the latter.

'Tell me, Mr. Beresford, does a mongoose in the Isle of Man have a tail or not?'

The ensuing discussion of Gef's physical characteristics was cut short by the judge asking Mr. Beresford:—

'Does offering a book of this sort to the public at six shillings net mean that the authors or author is mad, or that the purchaser of the book is mad? You are putting it forward as evidence of insanity on someone's part.'

That gave Mr. Beresford the opportunity of stating that he was *not* saying that the plaintiff was mad. He was denying that his client ever had suggested that the plaintiff was mad; his client had told Mr. Murray that the plaintiff was rather highly strung, somewhat credulous, not very well balanced, and apt to be inconsistent, and it was that allegation that he was justifying.

'Very well,' said Swift, 'I wish you would show me something in that book to make me think he believed a word of what he was writing.'

Mr. Beresford was referring to the opening passages, and Sir Patrick was inquiring, 'Have you read the bit about the dog's tail?' when the judge remarked, 'I suppose every humorist has to keep a straight face while he is telling his story, or it will be spoilt. He doesn't start out by saying, "This book is full of nonsense"—he waits till you have spent your six shillings and read it for yourself.'

It was difficult to make headway against Swift when he was in that mood. Indeed, the judge was in somewhat intransigeant frame of mind all through the evidence, and he not only let it be seen where his sympathies lay, but also was irritable with defending counsel and not exactly courteous to the defendant himself. The trial it will be remembered, was in November

1936: the shadows of the following tragic year were already beginning to fall.

* * * * *

At the close of the plaintiff's case Mr. Beresford submitted that the words had been spoken on a privileged occasion. If this were so, the plaintiff could not succeed unless he proved that the defendant had been actuated by 'malice', or indirect motive. Many occasions are thus privileged, among them being utterances made in pursuance of a social or moral duty, and Mr. Beresford had some ground for arguing that there was such a duty here. Sir Cecil had intervened with Mr. Murray on Mr. Lambert's behalf in 1934, and it could be, and was, urged that, having revised his opinion of Mr. Lambert, he was under a bounden duty to tell Mr. Murray so, or—as it was put—to give reasons for withdrawing his sponsorship. Sir Patrick in reply pointed out that Mr. Murray, though he had been the plaintiff's chief in 1934, was no longer so (owing to reorganization at Broadcasting House) in 1936, and that according to Mr. Murray's evidence Sir Cecil was well aware of this fact: therefore, he argued, if there was a duty to communicate with the B.B.C., Mr. Murray was not the right person to impart the information to.

Swift agreed with Sir Patrick Hastings. 'I fail to see any duty which was imposed upon him, or any right by which he was entitled to make a communication to Mr. Gladstone Murray about Mr. Lambert.'

Mr. Beresford then opened the defence, and Sir Cecil Levita entered the witness-box. He said he had been sure that the plaintiff believed in the talking mongoose and that the plaintiff's conduct over the dispute in the British Film Institute led him (witness) to decide to withdraw his sponsorship with the B.B.C., and he therefore arranged the Carlton Club lunch. 'On arriving at the club I said to Major Gladstone Murray, "This is a renewal, a continuation, of our confidential conversation", and I understood him to agree that that was so. . . . I did not suggest at any time to him for the B.B.C. that Mr. Lambert should be withdrawn. . . . I started by telling Major Gladstone Murray . . . that my mind had changed with regard to supporting Mr. Lambert at the British Film Institute, and that I was ceasing to give my support. That was the sole reason of the lunch, and that was what I told him.' He then related the inconsistencies of which, he alleged, the plaintiff had been guilty. After that the conversation changed to gossip, and Sir Cecil 'told, with a good deal of

amusement, the story of the talking mongoose. . . . I said that he had left me under the impression that he had a strong measure of belief in this ridiculous thing. . . . I gave it as an " on dit " with a laugh. I knew nothing other than that this story had been current and that he had a belief . . . in the Evil Eye. . . . I deny entirely that I said anything which could reasonably be imputed as saying that he was mad or crazy. I deny entirely that I deliberately hit my head.' He also denied saying he would go to Mr. Norman: ' I did say probably I ought to have gone to Sir John Reith or Mr. Norman when Mr. Gladstone Murray, towards the end of the luncheon, said that Sir Stephen Tallents was doing the job he had held. But that was rather late in the day for my purpose.'

Sir Cecil Levita was rigorously cross-examined by Sir Patrick.

' Have you ever believed that the plaintiff was no longer fit to be a governor of the Film Institute ? '

' No.'

' Then what in the world did you want to go and see Mr. Gladstone Murray about ? '

' About ridding myself of what I deemed to be responsibility given to the B.B.C. for a temporary continuance of Mr. Lambert's services.'

Sir Cecil admitted going to see Mr. Norman at the latter's home shortly after receiving the plaintiff's letter demanding an apology. He went to give Mr. Norman ' the facts of the situation '.

' I am now coming,' said counsel, ' to a very, very grave part of this case,' and he proceeded to suggest that the defendant tried to get Mr. Lambert dismissed if he would not stop the action. Sir Cecil indignantly denied this. He went to Mr. Norman, he said, to clear up the misunderstandings and because he had decided that the public interest of the B.B.C. and the Film Institute demanded that the truth be known.

' Had you anything to do with the B.B.C. ? ' asked Swift, and on receiving the answer ' No ', added, ' It is troubling me a good deal as to what you are doing in this case at all '.

The next day, the third of the hearing, Lady Levita was called, and so was a Mr. Fuller, another governor of the Film Institute, both of whom gave evidence as to Mr. Lambert's alleged inconsistencies, &c. The cross-examination of the latter produced a sudden surprise. After the start of the action he had lunched with Mr. Lambert, he said, to endeavour to ascertain if it were possible to get the action settled. He had previously seen Sir Stephen Tallents.

'Did you tell him that Sir Stephen Tallents had told you that if Mr. Lambert would not proceed against Sir Cecil Levita the B.B.C. would treat him well?'

'No, I never told him anything of the kind.'

'Did you get information from Sir Stephen Tallents which you came back and gave to this gentleman?'

'Yes.'

'Was the substance of it this: "If you don't settle this action the B.B.C. are going to turn you out"?'

'No, it was not.'

He had later, he said, seen Mr. Lambert at the Langham Hotel, going as the emissary of the defendant. In this part of his evidence reference was made to 'Sir Stephen Tallents's memorandum', and Sir Patrick, quick to press home an advantage, handed a copy of this document to the witness. Mr. Beresford protested, but Swift overruled him, and the memorandum was read. It produced what reporters used to call 'sensation in court'. It read:—

'I saw Mr. Lambert at 11.10 on the morning of 6 March. I told him that I was instructed:—

(1) to urge him to take a week's leave, as his doctor, I understood, had advised, and to consider the matter quietly again thereafter:

(2) to assure him:—

(*a*) that his position with the Corporation was not at present in any way prejudiced or damaged; but to tell him

(*b*) that, if he went on with the course which he had indicated to the Chairman the previous morning, there was a serious danger that he might well prejudice his position with the Corporation because—

(i) he would make the Corporation doubt his judgement;

(ii) he would seem to be placing his own interests in priority to those of the Corporation.

S. G. TALLENTS, 6.3.36.'

'Do you happen to notice the date of that letter?' demanded Sir Patrick.

'The 6th March.'

'Were you in court when the letter was read from [defendant's solicitors] of the 2nd March saying "We under-

stand the matters to which you refer are being discussed to-morrow by high officials of the B.B.C." ?'

'Yes.'

'You notice the somewhat striking similarity between the dates, don't you ?'

'Now you point it out, yes.'

'Could that, in your opinion, to any fair-minded man have any other meaning than this: "If you do not drop this action against Sir Cecil, you will get dismissed" ?'

The witness would not assent to that, not knowing what paragraph 2 (*b*) of the memorandum referred to.

That was the end of the evidence, and counsel's speeches were followed by the summing up. It was a fair summing up, and only once did Swift permit himself a vigorous passage: that was when he was directing the jury upon damages. After saying that if they found for the plaintiff, they ought to bear in mind the defendant's conduct from the time of the luncheon right down to the time of their verdict, he said, 'You may think—it is for you—that it is a dreadful thing when a man in a public position . . . thinking that he has been affronted or outraged, brings an action in these courts demanding redress for the wrong that has been done him, that behind his back his employers should be approached, and that they should be asked to bring pressure to settle the matter.' He also said, 'You may think it strange, whether you approve or do not approve, how very ready everybody seems to be to interfere in other people's business which is no concern of theirs at all'.

For the rest he directed their attention carefully to the issues: first they had to decide whether the words were spoken, and this was a question of deciding between Mr. Murray and Sir Cecil Levita; they then had to decide whether they were true, and this might not be difficult, because no one in court suggested that the plaintiff was 'cracked'; he also asked them to decide whether the luncheon conversation was privileged. Upon this last he said, 'You have no business, you know, to say "I know something about A. B., and I happen to be lunching with X.Y. so I will tell him". That is called luncheon gossip, but as far as I know luncheon gossip has never yet been held in law to be a privileged occasion in this country. . . . It is no defence to say, "Oh, well, I only told him confidentially". If you repeat something which is untrue and defamatory about a person, you are as responsible for it as though you invented it, and whether you say it at lunch or whether you say it anywhere else.'

Five questions were given the jury, and they spent from

3.35 till 4.40 p.m. debating them. They returned with the following answers :—

1. Did the defendant speak the words complained of ?—Yes.
2. Are the words true ?—No.
3. Was there a duty on the defendant, or had he a right, to communicate as he did to Mr. Gladstone Murray on 7 February 1936 ?—No.
4. Were the words spoken maliciously ?—Yes.
5. Damages, if any ?—£7,500.

The last answer caused a gasp. Seven thousand five hundred pounds as the price of lunch-time gossip: truly an expensive meal! The Temple could not remember a larger sum ever having been awarded in a slander action. One never knows, of course, how a jury arrives at damages, but it is a fair assumption that the roundness of the sum reflected the jury's views of the allegations of back-stairs influence at the B.B.C. Sir Patrick certainly had not erred in terming his accusations ' very, very grave ', and within a week the Prime Minister was informing the House of Commons that he had set up a special Board, consisting of Sir Josiah Stamp (as he then was), Sir Maurice Gwyer (now Chief Justice of India), and Sir Findlater Stewart, to inquire into them.

The report of this Board was laid before Parliament a month later. It is a Command Paper, and for the price of sixpence any one interested can now read the inner history of the B.B.C.'s connexion with *Lambert* v. *Levita*. What had happened, apparently, was that the information and documents given to Mr. Norman by Sir Cecil Levita had convinced the B.B.C. that the trial of the case in open court would be unfavourable to the interests of the Corporation; they had therefore endeavoured to have the case settled, not in Sir Cecil's interests, but in their own; but in so doing they had not put any improper pressure on Mr. Lambert. ' We are satisfied that . . . the actions of Mr. Norman and all the others who were concerned in the affair were done in the honest belief that these actions were in the interest both of the B.B.C. and of Mr. Lambert himself. Whether they were wise actions is another matter.' The Board thought they were unwise in many respects, and they sympathized with Mr. Lambert's indignation and alarm when he read the solicitors' letter about high officials of the Corporation discussing his case. They were especially scathing about the memorandum of 6 March: they did not adopt Sir

Patrick's interpretation of it ('We are satisfied that the B.B.C. meant to do no more than warn him that he would do himself no good in their eyes by proceeding with his action'), but they found the concluding words 'singularly inapt' and added, 'The B.B.C. have only themselves to blame for the unfortunate impression which these words in the memorandum have given'. Of the withheld salary increase they said, 'We are satisfied that the withholding of the increment was not intended by the Governors to be in the nature of a punishment nor to have any reference to the memorandum of 6 March; though we cannot but think that what they had regarded as Mr. Lambert's lack of judgement in not accepting the advice tendered to him in connexion with his action must have had some (perhaps unconscious) effect upon their minds. Nevertheless we think the B.B.C. acted unwisely in this matter.'

The question whether the Carlton Club luncheon was a privileged occasion was not of course before the Board, but in one passage there can perhaps be detected a hint that, had it been, they might have disagreed with Swift and the jury: 'There can be no doubt that when Sir Cecil Levita requested an interview with Mr. Murray, he did so because Mr. Murray was an official of the B.B.C. and because he (Sir Cecil Levita) regarded the matter as affecting the interests of the B.B.C. . . . Mr. Murray must, when he accepted the invitation to luncheon, have realized that the matter to be discussed, though primarily relating to Mr. Lambert, was also one in which his employers, the B.B.C., were concerned.'

There were criticisms in the report of Mr. Lambert himself. In fact, as the *Daily Telegraph* said, the result of their examination was that while nobody concerned got full marks, nobody was ploughed.

This report furnished a welcome brief for speakers in the debate in the Commons on 17 December 1936 upon the renewal of the B.B.C. charter, and it is in the pages of Hansard that the last repercussions of the Manx mongoose find themselves. But thither we cannot follow Gef. Some day, I hope, a verbatim account of the trial will be printed. It will provide instruction for many people; lawyers will be able to ponder the niceties of the pleading in the case and to admire the tactics of Sir Patrick Hastings; jurists will be able to use it to illustrate the peculiar English laws of evidence; sociologists will be able to draw pregnant contrasts between the views moulded in the hot crucible of the public courts and those coldly formed by a board of civil servants sitting in camera; admirers of Swift will be able to read in full his admirable

summing up; and the man in the street will be able to extract another laugh from Gef and to learn the heartening lessons that there is as much gossip in the Carlton Club as in the Pig and Whistle, and that those in high places are just as prone to error as any one else.

It is pleasant to be able to add by way of footnote that Mr. Lambert and the B.B.C. quickly composed their differences. Mr. Lambert continued to be editor of the *Listener* until the spring of 1939.

CHAPTER TWENTY-FOUR

PUCK IN ERMINE

One of the learned judge's characteristics is to put counsel into a little difficulty from which he extricates him at a later stage.

MR. NORMAN BIRKETT, K.C., on an Appeal from Swift J.

LONG before May 1937, when, upon the retirement of Mr. Justice Horridge, Swift became senior puisne judge of his division, he had become a legal institution, almost a living legend. His dominance over his court and the tang of his northern speech combined with his neat humour and his occasional mischievousness to exact a fascinated allegiance from the profession. 'Swift's in good form to-day,' the word would go round, bringing people flocking to his court. 'Heard the latest Swift story?'—that inquiry could be counted on in the halls of the four Inns, in the corridors of the law courts, at legal dinners, and wherever two or three barristers or solicitors gathered together. Story after story of the judge's wit and repartee went the rounds—and still do. The judge himself was not displeased by this: 'Have you heard any more stories about me?' he would inquire of a friend of his, a K.C. on the North-Eastern circuit. The friend would retail the latest anecdote, and the judge would say, 'Well, that's not quite right; but tell it—it's a good story!'

It was natural that as they passed from mouth to mouth the Swift stories should gain something in the telling, as was the case with the anecdote of Mr. Jackson's note, already related. This renders somewhat difficult the task of a biographer who is anxious to adhere to accuracy, and his task is further complicated by the fact that a number of hoary old tales which have been circulating in the profession for generations have been fathered upon the judge. Indeed, one of Swift's own favourite legal stories became thus fastened to him. It was the story of how the late Mr. Justice Grantham, sitting up writing late one cold night at the lodgings at Newcastle, found that everybody had gone to bed and there was no one to post his letters. He therefore muffled himself up in coat and scarf and went out to the letter-box himself. As he passed the

policeman on duty at the gate the latter remarked, 'What? Hasn't the old —— gone to bed yet?' The judge said nothing, posted his letters, and returned to bed. Before retiring, however, he opened his window and called, 'Constable! It's all right now. The old —— has gone to bed!'

One of Swift's marshals heard that story from the judge's lips at Liverpool—and within a week heard it told in the same town as having happened to Swift himself.

Indeed, the 'Swift story' which most tickled the judge was, so he assured his friends, apocryphal. (This was one lawyers will recognize as concerning 'The place marked "D" on the plan.')

However, the anecdotes which follow are, to the best of the writer's knowledge, matters of history and not of fiction.

* * * * *

One of the Bar's little ironies is that counsel who has been twiddling his thumbs for days or perhaps weeks will not infrequently find himself briefed in two courts on the same day. In these circumstances he will naturally explore the possibilities of postponing one or other of the cases. Now, standing a case out of the day's list purely for counsel's convenience is not a course which judges favour, and an application for postponement, therefore, is a somewhat delicate operation, and one in which a piquant situation may easily arise. In Swift's court it usually did, and those who wanted to watch the judge mischievously leading some barrister up the garden path would visit his court when these applications were being made. They would hear something like this:—

Very junior counsel applies to have case stood out of to-morrow's list.

Swift: 'Are you in the House of Lords to-morrow, Mr. ——?'

'No, my Lord.'

'Then perhaps you are in the Privy Council, Mr. ——?'

'N-no, my Lord.'

The judge's friendly tone changes to one of horrified suspicion.

'Mr. ——, are you in the police court to-morrow?'

'Er . . . Yes, my Lord.'

'You are a very impertinent young man.' Pause. 'But your application is granted.'

On one famous occasion a barrister had a young devil 'holding the fort' in Swift's court. The judge took his seat

sooner than was expected, and the devil had to make the application. He stammered out the bald fact that his master was in another court on the day in question. At that moment the barrister entered, to hear Swift inquiring in shocked tones if he was really being asked to alter the course of litigation for the convenience of counsel. He had to admit that that was so, and the judge said :—

' This is an impudent application, and one I do not usually grant, but as your opponent does not object, neither do I.' Then, his expression changing, he added. ' Next time you make an application like that, Mr. L——, *wrap it up a bit !* '

Counsel sat down. At that moment another junior rushed in. He had a similar application ; it was most urgent, he said, that his case should be postponed : the plaintiff's solicitor was ill, two of the plaintiff's witnesses were abroad, one of the medical witnesses for the defence could not attend, and the defendant's wife was expecting to be confined.

During this cataclysmic recital Swift's eyes had been gradually opening wider and wider. At its close there was a silence. Then the judge turned to counsel in the earlier case.

' Mr. L——, did you hear that ? *That* is the way to make an application.'

And turning to the second counsel he blandly inquired, ' And where are *you* to-morrow ? '

Swift might enjoy ' getting a rise ' out of counsel, but he rarely refused these applications. One barrister entered his court one day on such an errand, and found the judge delivering a judgement. He sat down in counsel's row and started to jot a note of his case. All at once the judgement was broken off. ' Mr. ——, would you mind writing your private letters in another court ? '

' I am happy to say I am not, my Lord : I am writing out an application I hope to make to your Lordship.'

' Would you mind doing it elsewhere ? It disturbs me.'

There was nothing for it but to leave, and he returned in trepidation at the end of the judgement to make his application. But the fireworks he anticipated did not come. Instead— ' Mr. ——, you may arrange my work for to-morrow, the cases I shall take, and the order I shall take them in. Need I say more ? '

Tales like that of the judge's kindness lack the spice demanded by the raconteur for a good anecdote, and do not therefore circulate so widely as the ' back-chat ' variety of Swift stories.

Nevertheless they are every bit as typical of the judge. Here is another. A certain barrister was waiting one Friday afternoon in a North-Eastern Circuit town for his case to be reached. He was anxious to be away soon after five because he had promised to visit his little girl at her school on the south coast that week-end, but unless he caught a certain train this would be impossible. Swift was the judge, and he knew of counsel's plans. At 4.30 the jury retired in the previous case. They were expected to be out for some time, and, as is customary, the next case—this barrister's case—was commenced to fill up that time. At five o'clock there was no sign of the jury returning, but Swift rose. 'It will be inconvenient for me to sit any longer to try this case,' he said. As a result counsel caught his train—and the judge paced his room till 6.30 waiting for the jury's verdict. Those who know how he hated inaction and loved to 'get on with the work' will be the better able to measure his goodness of heart.

Another instance of how the judge's kindness could override temporary annoyance is afforded by an incident at Guildford Assizes. A young unemployed barrister was whiling away the time in court by a surreptitious perusal of the newspaper. Swift observed this, and got an elder barrister to point out that this was out of order. The young man wrote a note to the judge, apologizing, and later received this reply :—

JUDGE'S LODGINGS,
LEWES.
10 *December*, 1929.

MY DEAR ——,

Many thanks for your letter.

Please do not in any way distress yourself about the incident at Guildford Assizes.

I am sure that on reflection you will see that it is not right to read newspapers in court. If the Bar do it the general public will follow their example.

I did not want to embarrass you by calling public attention to the matter so I asked —— to drop you a hint. I was not in the least annoyed and only desired to preserve the decorum of the court.

I am glad to have seen you again so soon.

I am,
Yours faithfully,
RIGBY SWIFT

Furthermore, the judge went out of his way to present that

young man with two court defences in order to emphasize that there was no ill feeling.

Swift's nerves were not strong. Motoring with him was something of an ordeal, so apprehensive was he apt to be as to the manoeuvres of other road users. His own chauffeur had orders never to exceed twenty-five miles an hour. In court the writing of a letter or the crackling of a newspaper at times seemed to electrify him, just as others are affected by the scrunching of sugar or the rubbing of glass. Newspapers were an especial *bête noire*, and quite a lore grew up around his objection to them. Once at Birmingham Assizes he interrupted an intricate legal argument with the query, 'Is there a public library in Birmingham?' Bewildered, counsel replied that there was. 'Is there one near at hand?' Yes, there was one close by.

'Then that is a more convenient place for reading the newspaper than my court. Let that man at the back go there!'

The man went.

One story which I have not been able to verify relates that, after a similar reprimand, the alleged offender, a member of the Bar, rose and expressed the hope that the ban would be withdrawn, 'because this copy of *The Times*, my Lord, contains the only report of a decision which it is my duty to cite to your Lordship in the next case'.

'Oh!' said Swift.

No one else in England could say 'Oh!' in the way he could. The word seemed to come from the back of his throat and yet be full and rounded; moreover he could pack more innuendo into that monosyllable than ordinary mortals could into five minutes' oratory. It seemed in a fraction of a second to convey comprehension, gentle reproof, and finality. 'Well, now of course I understand, and if only you had made it clear at the outset we should have been spared this misunderstanding'—that was what 'Oh!' meant in this case. Its meaning varied with the context, but one element was never lacking—finality. In that simple way the judge always contrived to give himself the satisfaction of the last word, and persons attempting to argue after 'Oh!' found themselves beating the air. Not that the judge often had occasion to employ it; usually he won these thrust-and-parry encounters, but he didn't mind if he lost, or would have lost but for his magical 'Oh!' It was the game he enjoyed, not the outcome, and that was why counsel so delighted him who had the courage to play it, and to answer back. Witnesses rarely overcame their respect for the ermine sufficiently

to indulge in this pastime, but at least one instance is remembered. A father whose boy had been associating with young thieves was in the box.

'We didn't do this sort of thing when we were young, did we?' said Swift.

'I can't answer that,' replied the unbending parent. '*I* didn't.'

The most resounding *riposte* ever administered to Swift took place during the hearing of a divorce petition at Liverpool. Applied to almost every other judge on the Bench it would have been a stupendous impertinence, and one shudders to think what would have ensued. But Swift did not take umbrage, though I believe that for once his 'Oh!' failed him. This was the question and answer:

Swift: 'Mr. ——, I see that the petitioner lives at Lancaster and the respondent at Carlisle, while the preliminary proceedings have been held in the Manchester registry. Can you, Mr. ——, explain why I have to try this case at Liverpool?'

Counsel: 'No, m'Lord, I cannot; but while we *are* here let's get on with it!'

Only the Northern Circuit could have produced that incident. From the same quarter comes another well-known Swift story, one of counsel laying a careful plot to outwit the judge but failing despite his preparations to get the last word. This anecdote arises out of Swift's punctiliousness in criminal trials. When a prisoner is acquitted he cannot be discharged until the judge so orders: most judges make this order as a matter of course, but strictly speaking defending counsel should apply for it, and Swift always insisted upon this being done. On the occasion in question a well-known Liverpool junior successfully defended a man who was already serving a prison sentence on another charge. Thus, although acquitted, the man would have to return to prison. Swift did not know this, and counsel expected, by not disillusioning him, to enliven the close of the case with a little fun. At first his plan succeeded admirably. The judge, deeming counsel in need of instruction, said:—

'Mr. Gradwell, have you no application to make?'

'No, my Lord.'

'Do you desire your client to remain in custody?'

'No, my lord.'

'Then think again! Have you *no* application to make?'

'No, my Lord.'

Swift (grimly), 'Warder, take the prisoner downstairs!'

At this point counsel thought he would blow the gaff. Smiling seraphically, he remarked :—

'I think I ought to inform your Lordship that my client is serving a sentence already.'

Quick as lightning Swift replied :—

'I know : but I did not think that even you would want him to serve it in the dock ! '

Swift had an answer for every one. Counsel once put a faulty calculation to him. 'Your arithmetic is not as good as it used to be,' observed the judge. The barrister explained that the figure was not his, but his instructing solicitor's. 'Then,' retorted Swift, 'his arithmetic is as bad as it ever was.'

Perhaps the neatest of the 'getting-the-last-word' stories has its venue not on the Northern but on the Western Circuit. Being a guest in the circuit mess, the judge remained seated during the Latin grace. This was a Northern Circuit custom, but on the Western was a solecism. Appreciating his error, the judge asked Mr. Du Parcq, K.C. (now Lord Justice Du Parcq) :—

'Will the Almighty be vexed ? '

'No, judge. He'll think you don't know Latin.'

First point to counsel !

But Swift did not forget the matter, and next day when a doctor said in evidence, somewhat to the stupefaction of those present, that the plaintiff was suffering from 'Pachymeningitis Haemorrhagica', Swift said, 'Ah ! Here's Mr. Du Parcq coming into court. He'll be able to tell us what that means. He understands Latin ! '

Second point to judge.

But counsel had heard enough of the word to recognize its derivation.

'I'm afraid, my Lord, it's Greek to me ! '

'Oh ! '

* * * * *

Another class of Swift stories, already instanced in this volume, embraces his piquant methods of teaching advocacy to those he deemed in need of instruction. Counsel defending a compensation case once breezily opened the defence by saying something like this : 'Happy to say, m'Lord, no conflict over plaintiff's condition in this case : our doctors think he's going to get well ; his own doctors think he's going to get well ; his wife thinks he's going to get well ; plaintiff himself think he's going to get well——"

This cocksuredness was too much for the judge. His pencil tapped on the desk: 'Mr. ——, *I* don't think he's going to get well!'

On another occasion a K.C. of notably robust voice was addressing a jury. As his enthusiasm for the case waxed, so did his tones. Presently he paused to refer to his notes. Swift said in a quiet voice, 'I hope, members of the jury, you can hear what learned counsel is saying to you'.

On one celebrated occasion he was trying a civil case without a jury. Defence counsel happened to be a don, and be began laying down the law to the judge rather as though he were lecturing a class of undergraduates. Swift put up with this for a while, then he tapped and said gently, 'Mr. ——, there is no jury in that box'.

The hint, however, was not taken. Presently Swift tapped again. 'Usher! Usher! Let there be light!' When the lights had been turned on, he added, 'Now, Mr. ——, you can *see* there is no jury in that box!'

Barbed reproofs of that sort sometimes ruffled the feelings of those to whom they were addressed. It was difficult, however, to take umbrage at the judge's twinkling eye and manifest good intentions. 'He frightened the young men for their own good,' as a brother-judge of his has said, and the wiser of the young men soon saw this; as one distinguished silk writes to me, apropos of an incident occurring when he was relatively junior and narrated elsewhere in this volume, 'He was a wise old bird, but I suppose that at that time I thought he was a dirty dog!' Many a barrister cherishes the same sentiments—though not all contrive to express them with such superabundance of zoological metaphor.

No, it was impossible to sustain hurt feelings with a judge so actuated by a sense of fun. For that was the key to this humour; whether it was dispensed with an ulterior motive or not, it always had in it the element of sheer fun, an impish, Puckish desire for enjoyment of laughter as one of the good things in life. Consider, for instance, this happening.

At Birmingham Assizes Swift was sitting in one of the two courts and being addressed by counsel on behalf of a lady who had suffered injuries resulting in diplopia (double vision). Counsel was Mr. Arthur Ward, an extremely busy barrister. During the speech counsel's clerk hurried in, and from the ensuing colloquy it became evident that another case of Mr. Ward's had been called on in the other court, and that the clerk thought he ought to be there to open it, while counsel was disinclined to break off his oratory in mid-flight. Swift

observed this incident for a moment or two, and then called the plaintiff to her feet.

'Do I understand that you are suffering from double vision?'

'Yes, my Lord.'

'Can you see two of everything?'

'Yes, my Lord.'

'Can you see two of Mr. Ward?'

'Yes, my Lord.'

'That's lucky. One of him is wanted in the other court!'

Judicial humour is sometimes spoken of as though it formed a class by itself, a species of wit bred only in the interplay of the law courts. Nothing could be further from the truth; humour varies with the mind of the man employing it, and not with the profession he practises, and the acknowledged wits of the Bench of the last half-century have differed in manner from one another as greatly as an A. P. Herbert differs from a Stephen Leacock. Acid wit had its exponent in Lord Justice Mathew, dry humour in Lord Justice Chitty, irresponsible jesting in Lord Darling, and open-handed fun in Swift. Because Darling was the popularly acclaimed 'funny judge' of the war years, and because Swift's reputation as a humorist was in the making when the former retired, some have spoken as though Swift followed Darling in a species of apostolic succession as judicial wit. That again is quite untrue, and the great gulf between Darling's dilettante jests and erudite witticisms on the one hand, and Swift's man-in-the-street fun and legal repartee on the other, demonstrates effectively how impossible it is to generalize about judicial humour. Darling's peculiar approach is well exemplified in a letter he wrote to Swift; it accompanied a much-appreciated gift of a set of robes, but even when engaged in this characteristically kindly action, Darling could not resist setting down a classical pun which he must have known the recipient of the letter would not understand.

HOUSE OF LORDS
31*st March.*

MY DEAR SWIFT,

To-day I have sent you the only one of my robes which remained—Spolia but not opima.

Long may you wear this.

Yours sincerely,
DARLING

In a strictly literal sense, it is seen, the mantle of Darling

fell upon Swift; but in the figurative sense it most assuredly did not.

There are many more Swift stories than are recounted in this volume. There are many hundreds of them. The majority are strictly legal in appeal, and could be explained to laymen only with difficulty. Many derive their sole appeal from the judge's highly individual manner of speech. All lose something when committed to paper. Nevertheless it would be a pity if they passed from memory with the present generation of lawyers. There was an Old Bailey judge of the last century, Serjeant Arabin, whose remarkable sayings went the rounds in his time and would now be forgotten had it not been for the fact that his friends garnered these tales and published them, the *Arabiniana* being to-day a much-sought-after volume for legal libraries. Would it be too much to hope that some day a *Swiftiana* will make its appearance? One friend of the judge's did indeed start such a work, but discontinued it upon discovering how much of the essence of the stories evaporated in cold print. The present writer has fully shared in that discovery, but he nevertheless feels that, after making due allowance for evaporation, the residue would be well worth preserving, and he respectfully commends the task of compiling the *Swiftiana* to the corporate zeal of the Northern Circuit.

CHAPTER TWENTY-FIVE

1937

'I have nothing to add.'

SWIFT'S last year saw his grimmest case, the first trial of Frederick Nodder.

Nodder was brought before him in March 1937 charged with the abduction of Mona Lilian Tinsley, a ten-year-old schoolgirl. On the previous 5th of January the child had left school at four o'clock, and had shortly afterwards been seen in company of Nodder, who knew her, having previously lodged with her parents. Nodder and a child were later seen on a bus. After that glimpse all trace of the girl vanished; she disappeared from human ken as completely as though she had never existed. Police and civilians searched high and low, but neither could she be found nor could any one be discovered who had set eyes on her after that dark January afternoon.

Such was the macabre story unfolded to the jury at Birmingham Assizes. The man accused chose not to answer it by giving evidence, and when the jury found him guilty, there was not a soul in court who did not feel him stained with the guilt of a far graver crime than the abduction with which he was charged. Swift, moved to horror by what he had heard, said: 'Frederick Nodder, you have been, most properly in my opinion, convicted by the jury of a dreadful crime. What you did to that little girl, what has become of her, only you know. It may be that time will reveal the dreadful secret which you carry in your breast. I cannot tell.'

Judge and judged stared at one another across the tense and crowded court-room; then the judge announced the penalty, the maximum sentence, seven years' penal servitude, and the prisoner smiled and turned on his heel and went down the steep stairs to prison. For an instant the mantling air of tragedy settled more deeply over the court. The angel of death was close at hand that day; he had already marked out for the reaper both the judge on the Bench and the prisoner in the dock. Before the year was out both were dead, the judge because his span was run and his generous spirit had at last outworn the frame it dwelt in, the prisoner because the judge's implicit

prophecy had come true and justice had overtaken him: Mona Tinsley's strangled body had been found in June in the River Idle, and the remorseless law had brought her murderer back again to the dock to answer for his true crime.

* * * * *

Swift's health was seen to be failing at this time, and neither his body nor his mind displayed its former vigour. This was the Assize, it will be recalled, of his last and least-disciplined outburst upon divorce law. For close on seventeen years he had sat upon the Bench, and the Bench had begun to take its toll. He had always been robust, though the gruelling work of his last years at the Bar had left their mark, and he suffered occasionally from colds and chills. Nevertheless during his first fifteen years of judgeship he had only missed one day in court and that because a chill had deprived him of his voice. Often he was on the Bench when he should have been in bed, but his stubborn mind refused to admit to itself that he was sick. Now with greater frequency recurring indications of waning vitality presented themselves, and the strain of warding them off was beginning at times to produce in him a frame of mind to which hitherto he had been a stranger—an irascible and testy frame of mind.

At this time, in March, he still possessed the twin refuges and sources of regeneration that had for so long served to buoy him up and imbue him with the desire for life. He had 'Kiona' and he had the law. In his judgeship he had what all men aspire to and few achieve, work that he loved, work that because he loved it gave back what it took from him. In 'Kiona' he had the home that he and his wife had together made, its daily customs sanctified by twenty years of happy usage, its every corner holding keys to countless memories. With Lady Swift at his side he could saunter through the gardens and the little farm that he and she had planned and made together, and prod the backs of his pigs, or sit drawing comfortably at his old briar pipe soothed by the lulling sounds from his pigeon-cotes, or lean on a wooden rail and watch from under his battered old farm hat the village lads at football on the field he had given them. Here he could renew himself, and repel the intimations of mortality. Here he had thrust down his roots, here the very air had borrowed something of his benignity of spirit, and the little house breathed the quiet content that thirty-four years of happily married life had bred. In the village of Crowborough husband and wife were looked up to as the leaders of the community, a position whose responsibilities they welcomed. In

February he was presiding there at a public meeting which he had convened in order to set in train the village Coronation celebrations, and his words on that occasion show better than any of the writer's could the mellow, loyal, conservative Englishman that he had become :—

'I want every child in Crowborough to realize what it has to look forward to. I want every old inhabitant to realize what he and she can look back upon: the blessings—and they have been great blessings—of the constitutional growth of the Victorian age, the wonderful progress which was made under Edward VII, and above all that they should realize what George V did for England and the British Empire. As the aged and the middle-aged sit and contemplate the past, and as the young look forward to what lies ahead of them, may they all gather new strength to take their share in the upholding of the British constitution.

'And how shall we celebrate? I should like to see a carnival, a torchlight procession, and a bonfire. These may be old-fashioned ways of celebrating events of this kind, and I may be old-fashioned in clinging to them, but do you know a better way? I don't.'

* * * * *

Swift was sixty-two years of age then, his sixty-third birthday falling in the following June. One would have liked to think of him going into a happy retirement, living out the evening of a fulfilled life on his beloved Sussex hilltop. It may be that such a closing chapter would have seemed to him an empty thing, for there are some to whom retirement from their life's work spells dissolution, and certainly no man was more closely wedded to his work than he, and the thought of retirement had always been anathema to him. But this is profitless speculation, for retirement was not his destiny; his wish to die in harness was destined to be fulfilled, and the blow which was to kill him was about to fall. Before the eagerly anticipated Coronation day came round his world had collapsed and fallen in pieces about him.

On Thursday 15 April, Lady Swift was stricken down with a heart attack. For four days and five nights she lay unconscious, and her husband sat by her bedside, watching, hoping, never leaving her, snatching a little sleep on a chair beside the bed. On the fifth day, the Tuesday, she died.

With her died the judge's desire to live. Their partnership had lasted too long for him, with his failing health, to form any

wish to carve out a fresh way of life. His life continued, but it was a continuation from mere momentum. There was no more replenishment of energy, and when the existing store was used up, the courageous heart ceased to beat.

He lived exactly six months after Lady Swift's death. After a month habit drove him back to work, and he later went circuit again, returning to Birmingham in July. There they were shocked at the change in him. He had to be assisted into court, and his attention could not always be kept upon the case before him. He was a doomed man, and he knew it. 'Marshal,' he said one day in the car on the way to the courts, 'Marshal, I shall be leaving you soon, and my brother Tucker will be appointed in my place.' Mr. F. J. Tucker, K.C., was then with him as Commissioner of Assize; Swift had always had a flair for prophesying legal advancement, and this last sad forecast, like so many of the others, came true.

There were still flashes of the old Swift. Sitting in court on Derby Day, he was privately informed of the result of the race. 'Usher!' he cried, 'the Midday Sun having run its course, we had better have some more light. Lights, please, usher!'

And though his former good-natured harrying of counsel for their own good had now degenerated into something like ill-temper, he would try to make amends. 'Marshal,' he would say at the midday adjournment, 'who have I been baiting this morning? Ask him to lunch!' And the harassed victim would be greeted with 'Well, my dear fellow, I *am* glad to see you'.

But these were the flickerings of dying embers. His work had ceased to absorb him, and it was difficult to find interest for his leisure hours. His pigeons alone still interested him, and every night on Assize an inquiry about them was made to 'Kiona' by telephone.

The Assize over, he rounded out the Trinity sittings in London. He felt it was his last term. To a brother-judge he said, 'I'm a sick man. My legs have gone, my stomach has gone, and my head is going.' He sat in the Court of Criminal Appeal on 29 July, and his last reported judgement is that which he then gave, dismissing the appeal of Leslie George Stone, the murderer of Ruby Keen. He returned to this court during the Long Vacation, as he had done every summer since his appointment, and insisted upon attending the sitting held on 17 August. He was in great distress, and when at the rising of the court he left the Bench, he knew it was for the last time.

'Evans, I'm done,' he said to his clerk.

He spent part of the vacation at Bath, and returned in

THE LAST ASSIZE

Birmingham, July, 1937

AT 'KIONA'

The Judge on his farm

September to 'Kiona'. He then seemed better. The rest and a visit from his sister, Miss Lilian Swift, and the care of his niece, Miss Vera Walmsley, who had come to keep house for him, seemed to have done him good. But 'Kiona' could not help now. 'Kiona' was the home of Beatrice and Rigby Swift, and now that the one had gone, it was a home for the other no longer. Its magic was dispelled.

Swift knew that his apparent better health was illusory. A brother-judge visited him at the end of the vacation. When the time of parting came Swift said :—

'You, Walter, will go back to your work. But——'

He left the sentence unfinished.

On 12 October the Michaelmas law sittings commenced, and the judges attended divine service at Westminster Abbey and walked in procession through the great hall of the Royal Courts of Justice. For the first time since 1920 Swift's cheerful figure was missing. Many noted his absence, and many wrote him letters of sympathy. Among these was Lord Hewart, and to his letter the judge dictated the following reply :—

'*Kiona*'
Crowborough
Oct. 14, 1937

MY DEAR CHIEF,

Your most kind and sympathetic letter has been a wonderful tonic and I already feel much better.

Yours very faithfully,
RIGBY SWIFT

That was his last letter. Within a few hours of signing it he was unconscious.

Like his wife he had a seizure, like his wife he was stricken on a Thursday, and like her he lingered till the following Tuesday. He was buried beside her in the churchyard at Rotherfield.

On the day after his death all the King's Bench judges then in London, and a great multitude of barristers and solicitors, gathered in the court of the Lord Chief Justice of England to hear Lord Hewart pay the law's last tribute to his memory.

'By his death His Majesty's judges have lost a brilliant and beloved colleague, and the public has lost an experienced and fearless judge. . . . At the age of forty-six—that is seventeen years ago—he became, as he remained, a judge of the King's Bench Division. During all those years he was known as an independent, humane, learned, and direct judge. He never

left any doubt what his opinion was. He never took refuge in words of ambiguity. It was never Mr. Justice Swift's way to steer a safe middle course in the channel of no meaning between the Scylla and Charybdis of Yes and No. It goes without saying that his nature was whole-heartedly incapable of treachery or intrigue, and he could never stoop for a moment to the mean arts by which favour and preferment are sometimes obtained. All who knew him knew not only his acute mind, but his kind heart—his large heart—and his generous disposition. He was, as so many of us had good reason to know, a man of deep affection, and it is certain that he never recovered from the shock of the death of his beloved wife. . . .

'We have lost a dear friend. How his place is to be filled I cannot imagine.'

APPENDIX

THE CIRCUITS AND MARSHALS OF MR. JUSTICE SWIFT

DATE		CIRCUIT (or town, where only one visited)	MARSHAL
1920.	Autumn.	North-Eastern.	Leo Page.
1921.	Winter.	South Wales.	R. Bush James.
	Spring.	Northern.	Clifford Middleton.
	Summer.	Northern.	F. D. Yeatman.
	Autumn.	Midland.	Clifford Middleton. J. Milner Helme.
1922.	Winter.	North Wales.	Godfrey Parsons.
	Spring.	Manchester.	(No marshal.)
	Summer.	Northern.	F. G. Binney.
	Autumn.	North-Eastern.	C. W. Muir.
1923.	Winter.	North Wales (and Cardiff).	Godfrey Parsons.
1924.	Winter.	Northern.	W. R. Trevor Smith.
	Summer.	North-Eastern.	J. B. Walmsley.
	Autumn.	South-Eastern.	A. Staveley Hill.
1925.	Winter.	Midland.	H. H. Barne.
1926.	Winter.	Northern.	A. Thorowgood.
	Spring.	Northern.	Ditto.
	Summer.	Western.	C. D. B. Leggatt.
	Autumn.	Oxford.	M. C. Adams. Charles Doughty.
1927.	Winter.	Oxford.	Charles Doughty.
	Autumn.	Midland.	A. C. Easton. C. D. B. Leggatt.
1928.	Winter.	Northern.	C. D. B. Leggatt.
	Summer.	Western.	Ditto.
1929.	Winter.	North-Eastern.	E. Shackleton Bailey.
	Autumn.	South-Eastern.	G. de P. Veale.
1930.	Winter.	Northern.	Ditto.
	Summer.	Western.	E. A. Doughty.
1931.	Winter.	Western.	T. F. Southall.
	Spring.	Leeds.	N. J. Skelhorn.
	Autumn.	Oxford.	John Hemingway.
1932.	Winter.	Northern.	Alan Lennox-Boyd.

DATE		CIRCUIT (or town, where only one visited)	MARSHAL
1933.	Autumn.	Leeds.	C. W. Jardine.
1934.	Winter.	Northern.	S. L. Langdon.
	Autumn.	Swansea.	Ralph M. Snagge.
1935.	Winter.	Western.	Geoffrey Wilson.
1936.	Winter.	Northern.	Andrew Parsons.
	Spring.	Leeds.	Peter G. Roberts.
	Summer.	Birmingham.	Arthur Collins.
	Autumn.	Swansea.	Alex. I. S. Knowles.
1937.	Winter.	Birmingham.	Ditto.
	Summer.	Birmingham.	C. Michael Lavington.

INDEX

ACTON, Mr. Justice, 51
'Aguirre incident', the, 62–3
Appeals from Swift, 131, 230 et seq.
Arabin, Serjeant, 274
Arabiniana, 274
Archbold's Criminal Pleading, 156, 233 et seq.
Aria v. *Bridge House Hotel*, 132–3
Army (Courts of Inquiry) Act, 1916, 36
Arnold, Matthew, 153
Ashton, A. J., K.C., 13
Asquith, Lord Oxford and, 19
Atkin, Lord, 36, 237
Atkinson, Mr. Justice, 46
Avory, Mr. Justice, 7, 51, 76, 135

Ballard, Alfred Casanova, 191–3
Bamberger case, the, 57 et seq.
Banks, Sir Reginald Mitchell, 29
Battersby, General, 34
Baylis, Judge, 12
Beresford v. *Royal Insurance Co.*, 224–5
Beresford, Tristram, K.C., 254 et seq.
Berrett, Det.-Insp. James, 117
Betteridge v. *Rhodes*, 90
Bigham, Q.C. *See* Lord Mersey.
Birkenhead, Lord (Lord Chancellor), 26, 45, 50, 51, 141, 217. *See also* F. E. Smith.
Birkenhead Local Government Inquiry, 26
Birkett, Norman, K.C., 94 et seq., 265
Birmingham, Swift at, 146, 149–50, 278
Black Magic case, the, 225 et seq.
Blue Bird Petrol case, the, 172–3
Bodel, F. E., 19, 26
Bodkin, Sir Archibald, 39, 41, 114
Brampton, Lord, 80
Brandon v. *Osborne Garrett & Co.*, 127, 129, 139
Branson, Mr. Justice, 45, 46, 239
Bridgeman, Lord, 113
British Broadcasting Corporation. *See Lambert* v. *Levita*.
Brixton taxicab murder, 102 et seq.
Brown v. *Joyce*, 135

Caldecutt v. *Piesse*, 133
Campbell, J. R., 175
Carlin, Supt. Francis, 116–17
Carpenter v. *Haymarket Hotel, Ltd.*, 133
Carson, Lord, 28
Casswell, J. D., K.C., 231 et seq.
Cave, Mr. Justice, 9
Charing Cross trunk murder, the, 163 et seq.
Charles, Mr. Justice, 58, 239
Chesterton, Cecil, trial of, 27, 28
Chesterton, G. K., 28
Cheylesmore, Maj.-Gen. Lord, 36
Chitty, Lord Justice, 273
Chitty, Sir Joseph, 8
Citrine, Sir Walter, 179
Clarke, Sir Percival, 83, 119 et seq., 163 et seq., 175
Cleghorn v. *Oldham*, 223
Collins, Michael, 83
Communists, trial of the, 174 et seq.
'Consortium' in law, 210
Cooper, Judge Shewell, 137
Cornish, Chief Inspector, 163 et seq.
Cornwallis-West affair, the, 35
Cotton wages arbitration, the, 189–91
Court of Appeal, Swift in, 125–6, 139. *See also* Appeals from Swift.
Cowans, General Sir John, 33 et seq.
Cripps, Sir Stafford, 192
Croom-Johnson, Mr. Justice, 181, 223
Crowborough. *See* 'Kiona'.
Crowley, Aleister, 225 et seq.
Curtis-Bennett, Sir Henry, 119, 171, 240

Daft family, the, 1, 3
Daily Worker contempt case, the, 180
Darling, Lord, 51, 60, 113, 174, 248, 273
de Clifford, Lord, trial of, 239–41
Divorce, Swift and, 139, 140 et seq.
Doughty, K.C., 212 et seq.
Douglas-Pennant, Miss Violet, 46
Dowdall, Judge Challoner, 85
Duke, Sir Henry, 58

Du Parcq, Lord Justice, 271
Dwelly, Dean, 251–2

Earengey, Judge W. G., K.C., 197 et seq.
Eddy, J. P., K.C., 134, 226 et seq.
Edwards, Dr. F. H., 41
Election Petitions, 126–7, 191–3
Elias, Alfred, 19
Ellenborough, Lord, 85
Enticement cases, 211 et seq.
Evans, Archibald, 5, 14, 19, 52, 278

Fahmy, Mme., trial of, 119 et seq.
Fairfield, Lord (Lord Justice Greer), 6, 19, 25, 57
Finlay, Lord Justice, 231
Fletcher-Moulton, Hon. H., 116–17
Foot, Isaac, M.P., 249
Fox, C. R., Chief Constable, Oxford, 195 et seq.
Fox-Davies, A. C., 103 sqq., 114
Fulton, Eustace, 119, 240

Gallacher, William, 175, 176
Gardiner, Gerald, 254
Gef, the mongoose, 256 et seq.
George III, 52
George V, 52
Giveen, H. M., 175
Glover, Thomas, M.P., 23 et seq.
Goddard, Mr. Justice, 239
Gorman, William, K.C., 29
Graham, William, 245
Grantham, Mr. Justice, 265
Gray, Frank, M.P., 126–7
Greaves-Lord, Mr. Justice, 15, 19, 21, 234
Greer, Lord Justice. *See* Lord Fairfield.
Gregory, Sir Holman, 83
Guest, E. R., 197
Gulley, William Court, Q.C., 29
Gwyer, Sir Maurice, 262

Hailsham, Lord, Lord Chancellor, 27, 46, 54, 131, 175, 211, 240
Haldane, Lord, 25
Hallett, Mr. Justice, 213 et seq.
Hannington, Wal, 175
Hanworth, Lord, M.R., 136
Hardy, Fred, 49
Hare Spinning Co. case, 46
Harris, W. H., 19
Hastings, Sir Patrick, K.C., 46, 49, 211, 254 et seq.
Hayes, Cecil, 60 et seq.
Hempson, O. A., 44
Henderson, Arthur, K.C., 175
Herbert, A. P., M.P., 135, 145
Hewart, Lord, L.C.J., 25, 41, 48, 50, 52, 82, 135, 237, 279
Hilbery, Mr. Justice, 226 et seq.
Hogg, Sir Douglas. *See* Hailsham, Lord.
Holland, Franklin, 19
Holmes, Valentine, 254
'Horatius', 245–6
Horridge, Mr. Justice, 6, 22, 58
Horwell, Chief Inspector, 195 et seq.
Huddlestone, Supt., 184 et seq.
Humour, judicial, 273
Humphreys, Mr. Justice, 39 et seq., 175
Humphreys, Christmas, 166, 240
Hyslop, Dr., 41

Inskip, Sir Thomas, K.C., 236, 240
Isaacs, Godfrey, 28
Isaacs, Rufus. *See* Lord Reading.

Jackson, J. C., K.C., 250–1
Jelf, Mr. Justice, 16, 18
Jones, Jenkin, 93
Jowett, Sir William, 180
Joyce, Miss Angela, 93 et seq.
Joyce, John, 49
Joynson-Hicks, Sir William, 179

Kaslopski case, the, 118
Kempson, Mrs., murder of, 194 et seq.
Kent, H.R.H. Duchess of, 248
'Kiona', Crowborough, 55, 56, 189, 276–7, 279
Knight, Reginald, 231
Knowles, J. W., 11

Lambert v. *Levita*, 253 et seq.
Lambert, H. S., 253 et seq.
Lancastrians Association, 182
Laski, Neville, K.C., 94 et seq.
Law Society, the, 68
Lawrence, Lord Justice, 6
Lawrence, Mr. Justice, 234
Leigh, Sir John, 46
Levita, Sir Cecil, 253 et seq.
Lewin, H., 19
Libel actions, 225
Lincoln's Inn, 8, 30, 248
Liverpool, Swift and, 69, 242 et seq.
Lloyd George, David, 30, 36
Lorang, trial of, 76, 172–3
Loreburn, Lord, Lord Chancellor, 25
Lowenthal, K.C., 187
Lyon, M. D., 166

McCardie, Mr. Justice, 7, 49, 51, 174

McCloskey, A. E., 166
MacDonald, J. Ramsay, 179
Maclean, Donald, M.P., 36
Macmillan, Lord, 139
Macnaghten, Mr. Justice, 134, 218
Macready, Gen. Sir Neville, 82, 83
Marconi scandal, the, 27, 28
Marjoribanks, Edward, 120
Markham, Sir Arthur, M.P., 35–6
Marshall-Hall, Sir Edward, K.C., 119 et seq.
Mason, trial of, 14, 102 et seq.
Mathew, Lord Justice, 273
Maugham, Lord, Lord Chancellor, 31
Maugham, Somerset, 53
Maybrick case, the, 2
Maynard, trial of, 159–61
Merriman, Sir F. Boyd, 29
Mersey, Lord, 11, 21, 190
Micklethwait, St. J., K.C., 196 et seq.
Miller v. *Cannon Hill Estates, Ltd.*, 137
Miller, A. T., K.C., 4
Mongoose case, the, 253 et seq.
Morris, O. G., 19, 247
Moses, J. J. H., M.P., 191–3
Muir, Sir Richard, 28, 45, 60 et seq., 103 et seq., 114
Murray, W. E. Gladstone, 254 et seq.

Nelson, Humphrey, 19
Newcastle robbery case, the, 72
Newman, Benjamin, 15, 19
New Procedure, the, 218–19
Newton v. *Hardy*, 211 et seq.
Nicholson, Field-Marshal Lord, 36
Nodder, trial of, 275–6
Northern Circuit, the, 3, 158, 242 et seq.
Nunan v. *S.R.*, 129–30

O'Connor, Martin, 223, 226 et seq.
O'Connor, T. J., K.C., 236
O'Connor, T. P., 24
Odgers, W. Blake, K.C., 162
Oliver, Mr. Justice, 119, 192–3
Oliver v. *Birmingham Omnibus Co.*, 134
Oxford election petition, 126–7
Oxford murder case, the, 194 et seq.

Page, Leo, 72
Parnell Commission, the, 36
Patterson, Frank, 180–1
Pemberton, Sir Max, 91
Penton v. *S.R.*, 130
Phillimore, Mr. Justice, 27
Pickford, Mr. Justice. *See* Lord Sterndale.
Pitchers v. *Surrey C.C.*, 138
Plymouth Election petition, 191–3
Pollitt, Harry, 175–6
Price, Harry, 252
Price, Wilfred, 197
Priestley, Frank, 180–1
Pringle, W. M. R., 175
Prothero, Inspector, 159

Rabbit-catcher's case, the, 159–61
Rae, Charles, 19
Ray, Robert, 4
Raymond v. *Wooten*, 138
Reading, Lord, 28, 248
Revelstoke case, the, 93 et seq.
Rex. v. *Commissioners of Customs, ex parte Pegler*, 135
Rex. v. *Donovan*, 138
Rex v. *Essex Justices, ex parte Perkins*, 136
Rex v. *Lapworth*, 138
Rex v. *Minister of Health, ex parte Yaffe*, 135
Rex v. *Newport Justices, ex parte Wright*, 135
Rex v. *Norman*, 138
Rex v. *Riordan*, 136
Richardson, E. Rider, 240
Ridley, Mr. Justice, 27
Rigby, Sir John, 1, 8
Riley, H. Linden, 26
Roadley, murder of, 159–61
Roberts, G. D., K.C., 166
Robinson, trial of, 163 et seq.
Roome, H. D., 103
Russell of Killowen, Lord, 85
Rutherford, Col. N. C., trial of, 33, 37 et seq.
Rutherford, Mrs., divorce case of, 45–6

Said Ali, murder of, 170 et seq.
St. Helens explosion case, 15
Swift born at, 1
Swift M.P. for, 23–4, 47–8
Salter, Mr. Justice, 41
Samuel, Lord, 28
Sanders, Sir Edgar, 26
Sanderson, Sir Lancelot, K.C., 29
San Dwe, trial of, 170 et seq.
Sankey, Lord, Lord Chancellor, 126, 189, 218, 236–8
Scott, Lord Justice, 16, 19, 46, 55
Scrutton, Lord Justice, 135, 210, 217
Segar, George, 6
Selby, Lord, 29
Senter, J., 254
Sexton, James, 47
Seymour, H. D., trial of, 196 et seq.

Shadwell, Vice-Chancellor, 80
Shand, Judge, 6
Shaw, trial of, 16
Simmonds v. *Simmonds* 143, 144
Simmonds v. *Thomas*, 210–11
Simon, Mlle. Odette, 122
Simon, Sir John, 46
Sinn-Fein case, the, 80 et seq., 189
Slator, May, trial of, 184 et seq.
Slesser, Lord Justice, 175
Smith, Cuthbert, 9, 21
Smith, F. E., 19, 28, 45. *See also* Lord Birkenhead.
Smith, Harold, 47
Smith, Peter, trial of, 26
Somervell, Sir Donald, 240
Spilsbury, Sir Bernard, 168, 169, 195, 197
Stamp, Lord, 262
Steel, A. G., 13
Sterndale, Lord, M.R., 6, 22, 68
Stewart, Sir Findlater, 262
Stewart, W. J., 6
Streatfeild, G. B., K.C., 186 et seq.
Swift, Alice, 1
Swift, Ernest, 1
Swift, George, 1
Swift, John, 1
Swift, Lady, 30, 55, 56, 189, 276, 277. *See also* Walmsley, M. Beatrice.
Swift, Miss Lilian, 15, 48, 279
Swift, Sir Rigby P. W., birth of, 1
childhood, 2–3
pupil to father, 4
accent of, 7
call to Bar, 8
first brief, 9
earnings at Bar, 12, 18, 22, 31
head of chambers, 14
engagement, 15
marriage, 16
leading junior of Liverpool, 19
advocacy, methods of, 19–21, 31–33
humour of, 21, 70, 162, 220 et seq., 250–2, 265 et seq.
moves to London, 22
M.P. for St. Helens, 24
takes silk, 25
extent of practice, 28, 30–31
Recorder of Wigan, 29
Bencher of Lincoln's Inn, 30
character of, 48, 52–4, 74–5, 247–8
appointed to Bench, 51
purchase of 'Kiona', 55
first great trial, 58 et seq.
a strong judge, 68–9, 85–9, 125
Lancashire, love of, 69, 242
first circuit, 70 et seq.
Swift, Sir Rigby P. W.—*continued*
attitude to punishment, 70 et seq.
hatred of, of prisons, 75–6, 249
clemency of, 77–9
tries case in train, 80
celebrated for summing up, 88, 194
Press, relations with, 90
and death sentence, 77, 119
as law maker, 129 et seq.
appeals from, 131, 229
whether great judge, 131–2
divorce, attitude to, 150–1
on circuit, 152 et seq.
piety, 155
recreations, 156, 189, 276
children, love of, 157–8
attacked by *Daily Worker*, 180–1
after-dinner speaker, 183
attitude to Bar, 183–4, 244–7, 266 et seq.
as law reformer, 216–7
and Northern Circuit, 42 et seq.
senior King's Bench judge, 265
failing health, 276 et seq.
last sitting in court, 278
death of, 279
law's tribute to, 279–80
Swift, Thomas, 1 et seq., 15, 19, 26
Swift, Walter, 1
Swift, William, 1

Talbot, Mr. Justice, 135, 191, 193
Tallents, Sir Stephen, 254, 259 et seq.
Taylor, Sir W. Kyffin, K.C., 6
Thomas, Judge A., 20
Thompson v. *L.M.S.*, 130
Thompson, Gilbert, 19
Tighe, trial of, 13–14
Tobin, Judge Sir Alfred, K.C., 6, 13, 16, 19
Tomlin, Lord, 237
Tottenham murder case, the, 118
Trapnell, K.C., 231 et seq.
Tucker, Mr. Justice, 278

Vine, Lawrence, 166 et seq.
Vivian, Eddie, 102 et seq., 115

Wallasey incorporation inquiry, 26
Walmsley, Miss M. Beatrice, 15. *See also* Lady Swift.
Walmsley, Miss Vera, 279
Walton, Mr. Justice, 29, 54
Ward, Arthur, 272
Ward, F. Brennan, 180–1
Warren v. *Warren*, 139
Wedgwood, Col., M.P., 179
Westwood crime, the, 76, 184 et seq.

Whitehaven colliery disaster, 25, 26
Whiteley, Judge, 60, 229
Whiteley, R. E., 19
Wigan murder case, the, 13–14
Wigan, Swift Recorder of, 29
Wightman, Mr. Justice, 153
Wild, Sir Ernest, 27, 172
Wills, Mr. Justice, 13
Wilson, Sir Horace, 189–90
Winter v. *Woolfe*, 135
Women's Royal Air Force Inquiry, 46
Woolmington, trial of, 230 et seq.
Wrenbury, Lord, 46
Wright, Lord, 237
Wright, Prof. William, 41

Zoo murder case, 170 et seq.

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